BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AL WARREN and BOB HART,
Petitioners,

vs.

JOSEPHINE COUNTY,
Respondent,

and

NINA HORSLEY,
Intervenor-Respondent.

LUBA No. 2012-028

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Alfred Warren, Beaverton, and Bob Hart, Rogue River, filed a joint petition for review and argued on their own behalf.

No appearance by Josephine County.

Nina Horsley, Cave Junction, filed a response brief and argued on her own behalf.

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

AFFIRMED 01/31/2013

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

Petitioners appeal a board of county commissioners' decision that denies an application for a comprehensive plan and zoning map amendments.[1]

FACTS

Petitioner Warren and Littie Weaver, the applicants below, own a 144-acre parcel. The comprehensive plan and zoning map designations for 134 of those acres is Forest (F) and Woodlot Resource (WR), respectively. The comprehensive plan and zoning map designations for the remaining 10 acres is Residential and Rural Residential (RR-5). In the original application, petitioner sought to change the F comprehensive plan designation and the WR zoning designation to Residential and RR-5. The planning commission voted to approve the application, with a condition that subdivision of the property be limited to nine lots to address transportation impact concerns. Record 850.

The application was considered by the board of commissioners in a September 26, 2011 public hearing. That public hearing was continued to December 14, 2011, to allow the applicant to prepare and submit a traffic impact study. An issue arose regarding whether it was appropriate to grant the requested comprehensive plan and zoning map amendments, which would allow division of the property into a relatively large number of five-acre lots. Specifically, an issue arose regarding whether the county has authority to impose a condition of rezoning approval to limit the number of lots possible, to respond to transportation system impact concerns. The applicants proposed to resolve that issue by changing the requested zoning from RR-5 to Limited Development (LD) zoning, a zone that has a 20-acre minimum lot size and would permit the property to be divided into fewer lots. At the conclusion of the December 14, 2011 hearing, there was no request from the parties to continue the hearing.

[1] Later in this opinion, we conclude that petitioner Hart lacks standing in this appeal and dismiss him from the appeal.

However, the board of commissioners held the record open for seven days to allow additional comment on the proposed change to LD zoning, and continued the hearing for a second time until January 9, 2012.

At its January 9, 2012 continued hearing, the board of commissioners granted a third continuance to January 23, 2012, to allow petitioners time to respond to a number of documents that were submitted (1) during the initial seven-day period the record was held open and (2) during the second-seven day period the record was held open at the request of one of the opponents of the application. In their second assignment of error, petitioners allege the county committed a number of procedural errors during this period, in allowing extraneous evidence into the record and in improperly granting a request for a second seven-day open record period. We discuss the events that transpired between December 14, 2011, and January 23, 2012, in more detail in addressing petitioners' second assignment of error below.

At the beginning of the January 23, 2012 continued hearing, the chair of the board of commissioners explained:

> "* * * This continuance was to allow everyone the opportunity to submit their comments. The record is closed as there has been ample opportunity for everyone to submit their comments." Record 283.

During their deliberations, the minutes disclose that the two commissioners that were participating in the decision had different views about the application; commissioner Reeder believed the application should be approved, and chair Hare expressed concerns about potential impacts, including impacts on neighboring Rough and Ready Lumber LLC, as well as concerns about the applicants' water study. Record 285. Those commissioners ultimately voted to continue the hearing for a fourth time, to February 13, 2012, to allow newly appointed commissioner Haugen to determine whether he wished to participate in the decision. At the January 23, 2012 hearing, intervenor-respondent Horsley objected to

commissioner Haugen's participation, citing his friendship with the applicants' planning consultant Hart as well as a financial relationship.

At the February 13, 2012 hearing, commissioner Haugen disputed the truth of intervenor-respondent's contentions that he could not participate in this matter objectively, but nonetheless determined he would not participate in a decision on the application, citing "time" considerations and "family issues." Record 19. Following their 1-1 vote on a motion to approve the application, with commissioner Reeder voting in favor and commissioner Hare voting against, the minutes indicate "[t]he request is denied." Record 21.

Finally, at its March 28, 2012 meeting, the board of commissioners voted to approve the written decision and findings that planning staff had prepared following the board of commissioners' oral decision on February 13, 2012. At that March 28, 2012 meeting, petitioners requested permission to offer "Points of Order to the Findings."[2] That request was denied, and this appeal followed.

STANDING

The notice of intent to appeal in this matter identifies Al Warren (Warren) and Bob Hart (Hart) as petitioners and indicates that petitioners will represent themselves. Hart is designated as lead petitioner. OAR 661-010-0015(3)(f)(A).[3] Intervenor-respondent Horsley challenges Hart's standing. Specifically, to have standing as a petitioner at LUBA, petitioner Hart must have "[a]ppeared" before the county in this matter. ORS 197.830(2)(b).[4] There is

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[2] This request concerned a March 25, 2012 letter from petitioners to the board of commissioners alleging that commissioner Hare is biased against petitioners and should not participate in the decision. We discuss that letter further under the sixth assignment of error.

[3] OAR 661-010-0015(3)(f)(A) provides in part:

> "* * * If two or more petitioners are unrepresented by an attorney, one petitioner shall be designated as the lead petitioner[.]"

[4] ORS 197.830(2) provides:

no question that Hart appeared numerous times before the county in this matter as a planning consultant representing the applicants. The issue is whether Hart also appeared on his own behalf, so that he has standing himself to appeal the board of commissioners' decision to LUBA. Intervenor-respondent contends that Hart's appearances below as a planning consultant representing the applicants was not sufficient to constitute the appearance that is required under ORS 197.830(2)(b). *See* n 4.

In his statement of standing, Hart contends he did appear below, both as a consultant on behalf of the applicants and in his personal capacity. Petition for Review 1. At the conclusion of his December 14, 2011 letter to the board of commissioners, Hart asked that he be recognized as a party below:

> "Because of the major policy issues that are addressed in the conduct of this hearing, I request to be recognized separately as a party to this application apart from my role as representing Al Warren and Littie Weaver. The decisions made will affect my ability to adequately represent clients as a Planning Consultant and to provide testimony and evidence in the course of public hearings. Thus, I would be considered as an aggrieved party in the conduct of this hearing." Record 157.

In the above statement, Hart appears to take the position that he wants the county to recognize him as a party in his individual capacity, so that he can better represent the interests of his clients Warren and Weaver. We do not understand that request. Hart cites nothing in the applicable county rules of procedure that would require that Hart be a party himself, to fully represent the interests of his clients before the county, and we are aware of no such requirement.

> "Except as provided in ORS 197.620, a person may petition the board for review of a land use decision or limited land use decision if the person:
>
> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

Regardless of how the county viewed Hart's status below, the standing requirement that Hart must have appeared below is a statutory requirement, and the question raised about whether Hart made the required statutory appearance for standing to appeal to LUBA is therefore a question of state law. The standing issue raised by intervenor-respondent was discussed in a recent decision in a slightly different context, which also concerned Mr. Hart. *Rogue Advocates v. Josephine County*, ___ Or LUBA ___ (LUBA No. 2011-037, July 26, 2012). In *Rogue Advocates*, Hart represented his clients (the Whitakers) as a planning consultant. When the county decision that was favorable to his clients was appealed to LUBA, Hart and the Whitakers moved to intervene on the side of respondent to defend the county decision. As is the case for petitioners, intervenors at LUBA must have appeared below to have standing at LUBA. ORS 197.730(7)(a)(B). In *Rogue Advocates*, we questioned whether Hart made the statutorily required appearance:

> "The Whitakers were represented below by intervenor-respondent Bob Hart, who is a land use consultant. We question whether a person who appeared below as a representative and consultant for the applicant has 'appeared' on their own behalf during the proceedings below for purposes of ORS 197.830(2) and (7). *See Doob v. Josephine County*, 49 Or LUBA 724, 727 (2005) (appearance as an expert on behalf of a participant to the local proceedings is not sufficient to satisfy the appearance requirement of ORS 197.830(7)(b)(B)); *Wetherell v. Douglas County*, 54 Or LUBA 782, 784-85 (2007) (person who represented the applicants below did not 'appear' on her own behalf or as the 'applicant,' and is not entitled to intervene under ORS 197.830(7)). That the county recognized Hart as a party for purposes of its proceedings below is not necessarily determinative of whether Hart 'appeared' for purposes of establishing standing under ORS 197.830(7) to appear as a party before LUBA. However, because no party in this appeal disputes Hart's standing to intervene, we do not further address the matter. *Rogue Advocates*, ___ Or LUBA at ___ (slip op at 3-4 n 1).

Returning to Hart's explanation of his desire to appear below in his own capacity. His explanation for that request was that he wanted to be better able to represent his clients' interests. Hart's only stated interest in the application is as a planning consultant who wishes to fully represent is clients' interests. Hart does not claim to have an interest in this

application that goes beyond his interest as a planning consultant for the applicants. A planning consultant who appears in that capacity in a land use proceeding before the county does not satisfy the ORS 197.830(2)(b) standing requirement that he have "[a]ppeared" before the county so that he has standing to appear as a petitioner at LUBA. Hart's appearance below was on behalf of the applicants, and that appearance is not sufficient to constitute the personal appearance required for Hart to have standing to appeal the county's decision to LUBA.

We agree that Hart must be dismissed as a party in this appeal. In view of our conclusion that Hart does not have standing in this appeal, all subsequent references to petitioner are to petitioner Warren.

INTRODUCTION

This appeal is somewhat unusual. The findings that accompany the board of commissioners' decision find that, with two exceptions, the applicants successfully demonstrated that the proposed map amendments satisfy all applicable approval criteria, including the requirement that applicants demonstrate that the subject property does not qualify as forest land. The two commissioners who participated in the decision could not agree whether Josephine County Rural Land Development Code (RLDC) 46.040(C) "adequate carrying capacity" criterion for comprehensive plan map amendments was satisfied, specifically with regard to an adequate potable water supply. Record 9-10. The two commissioners also could not agree whether the proposal satisfies the RLDC 46.040(D) requirement that the proposed map amendment be "consistent with the character of the surrounding area." Record 10. As we have already explained, one commissioner voted in favor of the application and the other voted against the motion to approve the application. The county took the position that the failure to achieve a majority vote in favor of the motion resulted in denial of the application.

Petitioner does not assign error to the county's position that the split 1-1 vote on the motion had the legal consequence of denying the application. Rather petitioner contends that the board of commissioners committed a number of procedural errors before voting 1-1 in favor of and against approving the application. Petitioner makes no attempt to demonstrate that their proposal complies with the subjective RLDC 46.040(C) "adequate carrying capacity" or RLDC 46.040(D) "consistent with the character of the surrounding area" criteria as a matter of law. Therefore, any remand would, at most, require that the same two county commissioners who disagreed about the RLDC 46.040(C) and 46.040(D) standards correct the procedural errors that petitioner alleges and vote again on the request.

It is at least possible that if the county committed any of the procedural errors that petitioner alleges, after correcting those errors, the remand might lead to a different vote by the two commissioners and a different decision. It is also possible that the third county commissioner who declined to participate might change his mind and participate, and result in a majority vote to approve or deny the application. Therefore, if we agree with petitioner that the county committed procedural errors that prejudiced their substantial rights, it is at least possible that a different decision might result following remand. Therefore we proceed to consider petitioner's allegations of procedural error.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner contends that the notice the county sent regarding the decision on appeal incorrectly characterizes the decision as legislative. Petitioner contends the decision is quasi-judicial. The familiar three-part inquiry that is used to distinguish between legislative and quasi-judicial decisions is set out in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979). Those three inquiries were described in *Hood River Valley v. Board of Cty. Commissioners*, 193 Or App 485, 495, 91 P3d 748 (2004) as follows:

> "First, does 'the process, once begun, [call] for reaching a decision,' with that decision being confined by preexisting criteria rather than a wide discretionary choice of action or inaction? Second, to what extent is the decision maker 'bound to apply preexisting criteria to concrete facts'. Third, to what extent is the decision 'directed at a closely circumscribed factual situation or a relatively small number of persons'?" (Citations to *Strawberry Hill* omitted.)

We agree with petitioner that for the decision in this appeal, all three inquires support a conclusion that the challenged decision is quasi-judicial rather than legislative.

While the county's notice of decision erroneously describes the decision as legislative, we do not believe that error in the notice provides a basis for remand, so long as the decision complies with all relevant criteria and the county committed no procedural errors that prejudiced petitioner's substantial rights. As far as we can tell, the county's mischaracterization of the decision itself did not result in a failure to apply the relevant criteria and did not prejudice petitioner's substantial rights.

Because the first assignment of error provides no basis for reversal or remand, the first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Documents Submitted Following the December 14, 2011 Hearing

Under this assignment of error, petitioner alleges the county committed a number of procedural errors following its decision on December 14, 2011, to leave the record open for seven days and continue the hearing to January 9, 2012. We set out those events before turning to petitioner's subassignments of error.

1. The Initial Seven-Day Open Record Period – December 14-21, 2011.

During the seven days the record was held open between the conclusion of the December 14, 2011 hearing and December 21, 2011, the parties submitted a large number of documents. Record 107-179 (Exhibits Y through JJ). Petitioner also contends other documents were submitted during this seven day period. Record 23-106 (Exhibits T through X). But as far as we can tell those documents were submitted either before or on the day of

the December 14, 2011 hearing. Petitioner's representative Hart submitted two documents supporting the proposed LD zoning. Record 23, 154-59. On December 19, 2011, Hart also advised the county that he intended to submit final legal arguments within seven days after the record closed on December 21, 2011. Opponents submitted a number of documents in opposition to the application before December 21, 2011. Record 24-146, 148-153, 160-179.

2. The Second Seven-Day Open Record Period – December 28, 2011 through January 3, 2012

On December 27, 2011, an opponent requested that the record be reopened for seven days to allow him an opportunity to respond to the document submitted by Hart during the first seven days the record was open. On that same date, the planning director sent an e-mail message to all parties advising them that he was granting the opponent's request and that the record would reopen on December 28, 2011, and would close again on January 3, 2012. In a December 29, 2011 e-mail message, Hart objected to the planning director's decision to reopen the record. Record 206. Thereafter, in a January 3, 2012 letter Hart stated that he continued to object to the decision to grant a second seven-day open record period. In that January 3, 2012 letter Hart stated that he nevertheless would "respond to the new testimony and evidence to protect the rights of my clients." Record 228. The four-page January 3, 2012 letter addresses a number of the documents that were submitted by opponents.

3. The January 9, 2012 Continued Hearing

In leaving the record open for seven days at the conclusion of the December 14, 2011 hearing the board of commissioners continued the hearing to January 9, 2012. At that January 9, 2012 hearing, the board of commissioner again continued the hearing to allow additional time for the applicants to respond to new evidence. The planning director explained his decision to leave the record open for a second seven-day period until January 3, 2012. The planning director explained that the applicants have seven days to respond to the documents submitted during the second seven day period and that the period for the

applicants to respond would expire on the day following the January 9, 2012 continued hearing, January 10, 2012. Record 294. The minutes also indicate that:

> "Mr. Hart requested until Friday, January 13, 2012 to respond to allow him sufficient time to review all the materials. Then the Board will have at least ten days to review the materials before the next hearing." *Id.*

The board of commissioner then voted to continue the hearing until January 23, 2012 and to grant petitioner until January 13, 2012 "to provide their rebuttal."

4. Hart's January 13, 2012 Letters

In a letter that is dated December 29, 2011, but stamped as received by the county on January 13, 2012, Hart provided what appears to be the final legal argument that applicants are entitled to submit after the record closes to all other parties under ORS 197.763(6)(e) and RLDC 31.120(J)(4).[5]

In a separate letter that is dated January 13, 2012 and stamped as received by the county on January 13, 2012, Hart objected that documents that were submitted by opponents before and on the date of the December 14, 2011 hearing should not be accepted into the record. Record 280-81. Hart also argued in that January 13, 2012 letter that the documents that were submitted by opponents during the two seven-day open record periods should be rejected. Hart took the position that the document he submitted during the first seven-day open record period included no new evidence so the second seven-day open record period should not have been granted.

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[5] ORS 197.763(6)(e) provides in part:

> "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. * * *"

RLDC 31.120(J)(4) includes almost identical language.

B. First, Third and Fourth Subassignments of Error

In the fourth subassignment of error, petitioner objects that the county erred by failing to act on Hart's December 29, 2011 objection to the planning director's December 27, 2011 decision to allow a second seven-day open record period to allow opponents to respond to the document Hart submitted on December 20, 2011 in support of the LD zoning. In the first subassignment of error, petitioner objects that the county erred by failing to act on Hart's January 13, 2012 objection to the new evidence that was submitted by opponents during the first and second seven-day open record periods. And in the third subassignment of error, petitioner argues it was error for the county to include the documents submitted by opponents during the first and second seven-day open record periods without giving petitioner an opportunity to rebut that evidence.

As petitioner correctly points out, the county's rules governing quasi-judicial land use proceeding provide that:

> "All evidence offered and not properly objected to may be received unless otherwise excluded by the hearing body. * * *" RLDC 31.110(A).

RLDC 31.110(A) at least suggests that if a party objects to offered evidence, the county will rule on such objections and either (1) advise the objecting party that the objection is rejected as improper or (2) sustain the objection and exclude the offered evidence. Petitioner probably has a legitimate complaint that the county never really provided an express response to Hart's December 29, 2011 and January 13, 2012 objections.

Petitioner is also correct that the county rules of procedure that the opponents and planning director cited in granting the second seven-day open record period apply at the stage of the *initial* evidentiary hearing, and technically did not apply at the December 14, 2011 hearing or thereafter, since it was not the county's initial evidentiary hearing. Under ORS 197.763(6)(a), "[p]rior to the conclusion of the *initial* evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding [an] application." (Emphasis added.) If such a request is made prior to the conclusion of the

initial evidentiary hearing, the county must either continue the hearing as provided in ORS 197.763(6)(b)[6] or hold the record open for seven days, as set out in ORS 197.763(6)(c).[7] In either case, if new evidence is submitted at the continued hearing or open record period, the record must be held open for seven more days to allow a response to the new evidence. But ORS 197.763(6)(a), (b) and (c), and the county's RLDC analogues to those statutes, applied at the conclusion of the board of commissioners' September 26, 2011 *initial* hearing, when the board of commissioners continued the hearing to December 14, 2011. ORS 197.763(6)(a), (b) and (c) did not *require* that the county continue the December 14, 2011 hearing to January 3, 2012 or hold the record open for seven days to allow additional comment on the change from RR-5 to LD zoning. And ORS 197.763(6)(c) did not require that the county grant the opponent's request for a second seven-day open record period.

But while the actions authorized and required by ORS 197.763(6)(a), (b) and (c) must be applied at the initial evidentiary hearing only, in practice local governments frequently do grant continuances and open record periods during hearings that follow the initial evidentiary hearing, if they believe circumstances warrant additional open record periods or continuances. And in the case of Josephine County, the county has adopted specific

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[6] ORS 197.763(6)(b) provides

> "If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence."

[7] ORS 197.763(6)(c) provides:

> "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 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."

authority to allow its hearing bodies to grant additional continuances and open record periods beyond the initial evidentiary hearing where the hearings body believes such actions are warranted. RLDC 31.120(J)(3).[8] Thus while the RLDC analogues of ORS 197.763(6)(a), (b) and (c), which were cited by the application opponent in this case in requesting the second seven-day open record and were cited by the planning director in granting that request, did not apply in this case, the board of county commissioners as the "hearings body" was clearly authorized to grant the second seven-day open record period and to allow an additional period until January 13, 2012, for petitioner to have an opportunity to rebut any of the evidence that was submitted during the two seven-day open record periods. The second seven-day open record period was initially authorized by the planning director, who may not qualify as a "hearing body" in this case. But the board of commissioners clearly does qualify as the hearing body and effectively ratified that decision by the planning director to grant the second seven-day open record period when it granted petitioner until January 13, 2012 to rebut any new evidence that was submitted during the two open record periods.

Hart then made the choice to stand on his objection to the county's *de facto* decision to allow all the opposition testimony that was submitted during the two open record periods. The additional rebuttal that the board of commissioners authorized on January 9, 2012 was certainly broad enough to allow petitioner to submit any rebuttal evidence petitioner wished to submit to rebut any evidence that petitioner did not believe had already been adequately rebutted by Hart's January 3, 2012 letter. The board of commissioners actually granted Hart's request for ten rather than seven days to prepare that final rebuttal, and we have no

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[8] RLDC 31.120(J)(3) provides in part:

> "Beyond the mandatory requirements [applicable at the initial evidentiary hearing] the hearing body is authorized to grant any other continuance, or leave the record open, subject to whatever reasonable guidelines and time limits it deems necessary or helpful to accomplish its fact finding and deliberating duties."

reason to suspect the board of commissioners would not have granted a request for even more time to rebut that evidence if petitioner had made such a request and shown that additional time was warranted.

In conclusion, although at least some of the opponent evidence submitted during the initial seven-day open record period likely went beyond addressing the change from RR-5 zoning to LD zoning, the county's decision to (1) accept that evidence, (2) grant the opponent's request for a second seven-day open record period and then allow petitioner ten days to submit whatever argument and evidentiary rebuttal they wished to submit before January 12, 2012, was clearly within the county's authority under RLDC 31.120(J)(3). And even if the county did allow the application opponents to submit evidence that went beyond the stated scope of the initial seven-day open record period, the county's election to follow the procedure authorized by RLDC 31.120(J)(3) to hold the record open to January 13, 2012, to allow petitioner the opportunity for final argument and final evidentiary rebuttal avoided any prejudice to petitioner's substantial rights that might have resulted from not limiting the scope of the evidence allowed during the open record periods.

The first, third and fourth subassignments of error are denied.

C. Second Subassignment of Error

The second subassignment of error concerns 24 photographs that were submitted to the county on August 3, 2011, by intervenor-respondent Horsley when this matter was before the planning commission. Record 903-26. Petitioner contends these photographs were submitted "to address the forest capability of the subject property." Petition for Review 8. At the December 14, 2011 hearing in this matter, petitioner testified the photos were of BLM property, not the subject property:

> "Mr. Warren said he had photos but they are on a flash drive. He said the photos Ms. Horsley submitted were not of the proposed property, but of BLM property. They are not representative of the proposed property. He said the property is lower down and a fire and logging have changed the topography of

> the land. Most of the property has Jeffrey Pine, brush and oak trees. He suggested Ms. Horsley's photos not be in the record as they are not representative of the subject property." Record 304.

In the second subassignment of error, petitioner argues the county erred by "tak[ing] no action to accept the photographs from the owner," and erred by failing "to take any action regarding the objection to Ms Horsley's photographs and the photographs remain in the record." Petition for Review 8.

As far as we can tell, petitioner Warren simply advised the board of commissioners that he had some photographs of the subject property on a flash drive. The above quoted testimony does not establish that he offered those photographs to the county or asked that they be made part of the record.

With regard to the Horsley photographs, the testimony at Record 304 simply says Mr. Warren "suggested [those] photos not be in the record." We do not believe that is sufficient to constitute a request to strike the photographs. Even if the county had erred in some way by allowing the photographs to remain in the record, no party disputed petitioner Warren's testimony that the photos were of different property, and the commissioners adopted no findings suggesting they relied on Horseley's photographs or believed those photographs to be of the subject property. And as we have already explained, the county commissioners agreed that the subject property does not qualify as forestland. Therefore any error the county might have committed with regard to the photos was harmless.

The second subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In this assignment of error, petitioner contends a February 9, 2012 letter from an application opponent to the board of commissioners objecting to the possible participation of newly appointed county commissioner Haugen in the decision constitutes an *ex parte*

contact. Petitioner contends the county failed to disclose this *ex parte* contact or provide petitioner an opportunity to rebut the factual assertions in the February 9, 2012 letter.

The February 9, 2012 letter is addressed to the board of commissioners, identified the subject application as the subject of the letter, and is dated four days before the board of commissioners' February 13, 2012 hearing at which it voted on the application. While copies of that letter apparently were not sent to the other parties in this appeal, petitioner identifies no RLDC requirement that parties submitting documents for the record in this application do so. In fact the other documents submitted for the record in this matter similarly do not indicate that copies of the submitted document were provided to the other parties in this appeal.[9] In fact, petitioner also objected to participation by a county commissioner in a letter dated three days before the March 28, 2012 meeting at which the board of commissioners voted to adopt its written decision and findings. That letter, like the February 9, 2012 opponent letter that is the subject of this assignment of error, is addressed to the board of commissioners, identifies this application as the subject of the letter and gives no indication that copies of the letter were provided to the other parties in this appeal. Apparently under the RLDC it is up to the parties to contact the county to obtain copies of any documents that may have been submitted concerning the application in advance of or following hearings on the application. Because petitioner fails to establish that the February 9, 2012 letter is properly viewed as an *ex parte* contact, this assignment of error provides no basis for remand.

Finally, it is worth noting that commissioner Haugen did not give as reasons he elected not to participate in this matter either the opposition to his participation in the

[9] The traffic study that petitioner submitted in advance of the December 14, 2011 hearing was submitted to the planning department and there is no suggestion in the record that copies of that study were provided to the other parties in this appeal. Record 309-94. Similarly, Hart's December 20, 2011 letter submitted during the seven-day open record period following the December 14, 2011 hearing does not appear to have been served on the other parties in this appeal. Record 154-59.

disputed letter or the oral opposition of intervenor-respondent at the January 23, 2012 hearing. Rather, commission Haugen cited lack of familiarity with the record and "family issues." Record 19.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

RLDC 46.040(C) requires that the applicants demonstrate that the land that is the subject of a comprehensive plan map amendment application has "adequate carrying capacity" to support the uses and densities that will be allowed by the amendment. RLDC 46.040(D) requires that the applicants demonstrate that proposed changes in comprehensive plan and zoning map designations will be "consistent with the character of the surrounding area." The county's findings explain that the two commissioners who participated in the decision were unable to agree regarding two issues: (1) the adequacy of the water supply under RLDC 46.040(C) and (2) whether the possible impacts on the adjacent lumber mill operations will result in an inconsistency with the character of the surrounding area that violates RLDC 46.040(D). Record 10.

Generally, findings that are adopted in support of a decision that approves or denies a request for quasi-judicial land use approval must: (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992); *see also*, *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977); *Vizina v. Douglas County*, 17 Or LUBA 829, 835 (1989). Petitioner contends the county's findings are not adequate under the above test for adequate findings.

Petitioner fails to appreciate that the county in large part found that the application complies with all relevant criteria. And while the board of commissioners was unable to agree regarding whether the application complies with RLDC 46.040(C) and (D), it did not

find that the application does not comply with those criteria on the merits. Rather the two participating county commissioners simply found that they could not agree. The county then determined that as a matter of law the split 1-1 vote resulted in denial of the application. Petitioner does not challenge that determination. Because the challenged decision did not deny the application on the merits, it does not matter whether the county's findings are adequate to support a decision to deny the application on the merits. The county is not required to adopt adequate findings to deny the application on the merits, where the decision does not deny the application on the merits. The county's findings must only be adequate to support the decision it adopted, which in this case was a tie vote that resulted in a denial as a matter of law. The county's findings are adequate to explain why the two commissioners viewed the evidence differently.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

As already explained, the applicants initially sought approval to rezone the property's 134 WR-zoned acres to RR-5. During the board of commissioners' December 14, 2011 hearing an issue arose regarding the need to limit the development of the property that would otherwise be possible under RR-5 zoning to mitigate traffic impacts to comply with OAR chapter 660, division 12, the Transportation Planning Rule. Hart suggested this mitigation be achieved by imposing a condition of approval that would limit the total number of lots that could be created and developed on the property. Record 299; 302-03. The planning director and county counsel took the position that because the proposal was for a rezoning, rather than a specific development proposal, such a condition was not authorized. Record 299-300; 302-03. Although Hart at one point asked the board of commissioners to rule that a condition of approval could be imposed on the RR-5 zoning, after county counsel indicated he agreed with the planning director, the minutes show that Hart then turned to a different issue.

Record 303. Later in his summation to the board of commissioners, Hart made the following proposal:

> "* * * In this application, RR-5 was selected as it was the most appropriate based on the historical use of the neighborhood. We are suggesting to the Board now the option to change the [WR] zoning to [LD] and not RR-5. That would solve the traffic issue as the [LD is a] 20 acre zone. That limits the development for the property to only seven lots, which more than meets the existing traffic study. * * *" Record 305.

Citing RLDC 25.040(E) and 31.130(A)(1)(c), petitioner contends the county erroneously determined that the board of commissioners lack authority to approve conditional rezoning.[10] We need not decide whether the county lacks authority under the RLDC to approve conditional rezoning. While it is clear that Hart and the planning director and county counsel disagreed about whether the RLDC permits conditional rezoning, we cannot tell from the record who the board of commissioners agreed with. As noted, Hart at one point asked the board of commissioners to rule on the question. But later, before the

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[10] RLDC Article 25 sets out "Board of Commissioners Review Procedures." RLDC 25.040(E) provides:

> "At the conclusion of the hearing, the Board may take any one of the following actions: [1] make a decision to outright approve; [2] make a decision to conditionally approve; [3] make a decision to deny the request; or [4] continue the hearing to a date and time certain for further evidence or decision only."

RLDC Article 31 governs "Public Hearings." RLDC 31.130 governs final actions and provides in part:

> "A. At the close of the public hearing, the hearing body may:
>
> "1. ON A QUASI-JUDICIAL APPLICATION:
>
> "a. Approve the application as submitted;
>
> "b. Deny the application;
>
> "c. *Approve the application with certain conditions as it deems appropriate*; or
>
> "d. Continue the application for further study, a site visit, deliberations, or a decision to a date and time certain." (Emphasis added.)

board of commissioners ruled on the question, Hart asked that he be allowed to amend the application to propose LD zoning rather than RR-5 zoning. As we explained earlier in this opinion, this led the board of commissioners to hold the record open for seven days to permit additional argument and evidentiary submissions concerning the LD zoning and to continue the hearing to January 9, 2012.

Given the above course of events, we do not have a reviewable decision by the board of commissioners, one way or the other, regarding whether the board of commissioners believed conditional zoning is permissible under the RLDC.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

RLDC 31.090 authorizes parties in quasi-judicial hearings to challenge the participation of a member of the board of commissioners based on bias.[11] In their sixth

[11] RLDC 31.090 provides:

"31.090 - CHALLENGE FOR BIAS, PREJUDICE, OR CONFLICT OF INTEREST

"A. Any applicant or opponent of a proposal may challenge the qualification of any member to participate in such hearing and decision because of bias, prejudice or conflict of interest.

"B. The challenge shall be in writing and shall state the facts relied upon for the challenge.

"C. The challenge must be submitted, to the Planning Director not less than 48 hours preceding the time set for the public hearing, unless good cause is shown as to why the submission could not be made in a timely manner.

"D. The Director shall attempt to notify the challenged member before the hearing.

"E. The challenged member(s) shall have an opportunity at the hearing:

"1. To agree with the challenge and withdraw from participation in the Hearing and decision; or

"2. To disagree with the challenge and respond orally and in writing.

"F. The challenge and any response shall be incorporated into the record of the hearing."

assignment of error, petitioner contends that commissioner Hare is biased. Petitioner contends that commissioner Hare has a close personal relationship with the owners of Rough and Ready Lumber and the owners of Rough and Ready Lumber "have been major contributors to Mr. Hare's campaign to become a County Commissioner." Supplement to Record of Proceedings 4. Petitioner contends that the county erred by ignoring petitioner's request that commissioner Hare not participate in the decision.

At the January 23, 2012 hearing before the board of commissioners, commissioner Hare expressed concern about the potential impacts of residential traffic from the proposal on Rough and Ready Lumber. Record 285. There was no objection at the January 23, 2012 hearing to commissioner Hare's participation. At the February 13, 2012 continued hearing before the board of commissioners, commissioner Hare repeated and elaborated on his concerns regarding the potential impacts of traffic from the proposed development on Rough and Ready Lumber business operations. Record 20. Again there was no opposition expressed regarding commissioner Hare's possible bias in this matter.

After the board of commissioners' vote on February 13, 2012 resulted in a tie, it was announced the application was denied. In a March 25, 2012 letter, which was received by the county three days before the March 28, 2012 meeting at which the board of commissioners approved its written decision and findings, petitioner filed his first and only objection to commissioner Hare's participation.

Petitioner's objection regarding commissioner Hare's participation came too late. Under RLDC 31.090(C), that objection should have been filed 48 hours before the February 13, 2012 hearing. *See* n 11. Petitioner's objection was not filed before the February 13, 2012 hearing. Neither was petitioner's objection filed during the February 13, 2012 where commissioner Hare would have had an "opportunity at the hearing," "[t]o agree with the challenge" or "[t]o disagree with the challenge," as provided in RLDC 31.090(E). Petitioner offers no explanation for why he allowed commissioner Hare to participate in the decision

without objection and then belatedly objected to his participation three days before the county was to take action to approve the written decision that made final the decision the board of commissioners rendered orally at the conclusion of the February 13, 2012 hearing. Petitioner does suggest in the first paragraph of the March 25, 2012 letter that the concerns about commissioner Hare's connection with Rough and Ready Lumber "did not become clear until I became concerned about the conduct of the hearing that was limited to decision only and the wording of the findings was developed." Supplemental Record 4. We are not sure what that statement means. As we have already explained, commissioner Hare's concerns about potential impacts on Rough and Ready Lumber, as expressed in the findings that were adopted on the March 28, 2012 meeting where the decision and findings were adopted, were nothing new. Those concerns were expressed at both the January 23, 2012 and February 13, 2012 hearings. Because petitioner waited until three days before the board of commissioners was scheduled to adopt the final written decision and findings, the board of commissioners' only option at that point if they wished to entertain and respond to petitioner's challenge would have been to schedule yet another hearing for commissioner Hare to respond to petitioners' challenge. Without a better explanation for why the challenge could not have been timely filed, the county was under no obligation to do so.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner's seventh assignment of error summarizes many of the arguments we have rejected under the first through sixth assignments of error and argues that those arguments demonstrate the board of commissioners was not an "impartial hearings body," as RLDC 31.040(A) requires.[12]

[12] RLDC 31.040 provides, in part:

We have already rejected petitioner's arguments under the first six assignments of error, and we do not agree that the actions they challenge, individually or collectively, demonstrate the board of commissioners was biased in this matter.

The seventh assignment of error is denied.

The county's decision is affirmed.

> "A. Land use hearings conducted pursuant to this Article which are quasi-judicial administrative determinations shall be conducted according to the rules and procedures governing those actions. All applicants are entitled to * * * an impartial hearing body * * *.
>
> "* * * * *."