BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL ENG and MONICA ENG,
Petitioners,

vs.

WALLOWA COUNTY,
Respondent,

and

STEVEN BILBEN,
Intervenor-Respondent.

LUBA No. 2018-085

FINAL OPINION
AND ORDER

Appeal from Wallowa 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 Wallowa County.

Rebecca J. Knapp, Enterprise, filed the response brief and argued on behalf of intervenor-respondent.

RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REMANDED 05/07/2019

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners of Wallowa County (the county) approving development of a forest template dwelling.

FACTS

This case follows LUBA's remand in *Eng v. Wallowa County*, 76 Or LUBA 432 (2017) (*Eng I*). As explained in *Eng I*, intervenor-respondent Steven Bilben (intervenor) purchased a vacant 38-acre parcel (subject property) zoned Timber/Grazing (T/G) in 1993. In November 2013, intervenor sought a zoning permit for a dwelling on the subject property.

The zoning permit is the county's approval for uses permitted in a zone. In 2013, the planning director approved the zoning permit (Zone Permit 13-66), explaining that while then-current rules would not allow a dwelling on the subject property, a map associated with a 1997 Land Use Compatibility Statement (LUCS) issued by the county for an on-site sewage disposal system showed a septic tank, drainfield and "a dwelling" on the subject property. Record 116-14.[1] It was county practice to not issue a LUCS unless a zoning permit had been issued, and while, in 2013, the county did not have a zoning permit for a dwelling

[1] The record in this appeal is paginated by item and page number, instead of consecutively. For example, Record 116-14 refers to item 116, page 14. Our citations to the record in this decision reflect the county's pagination.

on the subject property in its possession, the existence of the 1997 LUCS was evidence that the county believed the parcel was buildable at the time the LUCS was issued. *Id.* No hearing or notice was provided of the 2013 decision to issue Zone Permit 13-66.

Petitioners own the adjacent property to the north of the intervenor's property. In 2017, petitioners appealed the county's issuance of Zone Permit 13-66 to LUBA and we remanded the case to the county to address whether a co-petitioner, Loftus, had standing to appeal. We also observed:

> "If petitioner Loftus argues to the board of county commissioners (as she has argued to LUBA) that the disputed dwelling cannot be approved on the subject property under the applicable T/G standards, that potentially dispositive question would seem logically to be among the first questions for the board of commissioners to consider on remand." *Eng I*, 76 Or LUBA at 457.

Following LUBA's remand, the county issued an order addressing the remand and holding in part:

> "[t]he scope of the hearing shall include the substantive basis for the issuance of the Zone Permit 13-66 and not be limited to the issue of the standing of Kate Loftus or any other individual to appeal." Record 48-62.

The county mailed petitioners and all landowners within 750 feet of intervenor's property notice of a public hearing before the board of county commissioners to consider intervenor's application for a single-family dwelling. Record 48-62. The notice advised that the application would be reviewed for conformance with Articles 5, 12, 16 and 36 of the Wallowa County Land

Development Ordinance (WCLDO) as well as any other applicable county or state regulation. *Id.*

A staff report was issued on April 2, 2018, 16 days before the one evidentiary hearing held by the county. Record 48-6–48-17. The staff report explained that LUBA had remanded the decision on Zone Permit 13-66, that the county had decided to conduct a full *de novo* hearing on the merits of the permit's issuance, and that T/G Article 16 set forth the means by which a single-family dwelling may be allowed on a 40-acre parcel. Record 48-7.

Intervenor submitted evidence to support approval of a forest template dwelling at the April 18, 2018 hearing. Record 43-1–43-25. As explained further below, establishing that the subject property qualified for a forest template dwelling required, among other things, showing that (1) as of January 1, 1993, 11 lawful lots or parcels were located within a 160-acre square (the template), centered on the subject property, and three dwellings existed within the template and (2) the three dwelling still exist.

As requested by petitioners, the county left the record open for seven days for additional evidence and argument. Record 45-9. The county later extended the open record period further in order to allow the parties additional time to review a supplemental staff report discussing the forest template dwelling test. Record 35-2.

Much of the evidence and argument submitted by petitioners and intervenor during the hearing and the open record periods addressed the

appropriate way to identify the 11 parcels within the template and whether one of the three dwellings that intervenor relied upon existed on January 1, 1993. Experts offered competing testimony concerning the proper way to determine the center of the subject property. Petitioners maintained that Tax Lot (TL) 300, one of the lots intervenor relied upon as one of the 11 lots within the template square, likely fell outside the square if the proper centering method and a finer level of data were used. Petitioners also argued that one of the dwellings intervenor relied upon as one of the three required dwellings within the template square (the TL 3300 dwelling) was completed after January 1, 1993 and therefore did not "exist" on that date and could not be counted for purposes of the template test.

The record ultimately closed to evidence on May 14, 2018, and final legal argument on May 21, 2018. The county deliberated and determined that the subject property qualified for a forest template dwelling given the level of potential timber productivity of the land and the level of existing residential development in the area. This appeal followed.

OVERVIEW OF FOREST TEMPLATE DWELLING LAW

Forest and farm resource lands are generally preserved for forest and farm uses, with other limited allowed uses. ORS 215.700 to 215.783 govern the limited circumstances in which owners of forestland may construct dwellings on that land. As discussed above, the challenged decision approves a "forest template dwelling." ORS 215.750 authorizes the approval of forest template dwellings. Generally, an applicant for a forest template dwelling must demonstrate that the

subject property is within a square land area (the template) that contains a certain number of legally created parcels and a certain number of dwellings. The more capable the subject property is at producing wood fiber, the more stringent the requirements for a forest template dwelling approval. *See generally Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 192, 211 P3d 297 (2009) (interpreting ORS 215.750 and explaining overarching statutory scheme).

WCLDO 16.015.07(C) implements and adopts state forest template dwelling law and allows:

> "07. A single-family dwelling on a lot or parcel where no dwelling exists if the lot or parcel is composed of soils that are:
>
> "* * * * *
>
> C. [C]apable of producing more than 50 cubic feet per acre per year of wood fiber if:
>
> "1. All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the center of the subject tract; and
>
> "2. At least three dwellings existed on January 1, 1993, on the other lots or parcels[.]"

See also ORS 215.750(2)(c); OAR 660-006-0027(4)(c).[2]

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[2] ORS 215.750(2)(c) provides:

> "(2) In eastern Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

As discussed in the assignments of error, the county concluded that at least three other lots or parcels that existed on January 1, 1993 are within a 160-acre square centered on the subject property and at least three dwellings existed on January

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"* * * * *

"(c) Capable of producing more than 50 cubic feet per acre per year of wood fiber if:

"(A) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

"(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels."

OAR 660-006-0027(4)(c) provides:

"(4) In eastern Oregon, a governing body of a county or its designate may allow the establishment of a single family 'template' dwelling authorized under ORS 215.750 on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

"* * * * *

"(c) Capable of producing more than 50 cubic feet per acre per year of wood fiber if:

"(A) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

"(B) At least three dwellings existed on January 1, 1993 and continue to exist on the other lots or parcels."

1, 1993 and continue to exist on those other lots or parcels. Petitioners challenge those findings in their assignments of error.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error alleges, in several subassignments of error, that the county committed numerous procedural errors that prejudiced their substantial rights. LUBA will reverse or remand a decision if it finds the local jurisdiction failed to follow applicable procedures in a manner prejudicing a petitioners' substantial rights. ORS 197.835(9)(a)(B).

A. First Subassignment of Error

ORS 197.763 sets forth the procedures governing the conduct of quasi-judicial proceedings. It requires that the notice provided by the local jurisdiction be given at least 20 days before the evidentiary hearing if only one hearing will be held and identify the nature of the application, the uses which may be authorized, and the applicable approval criteria. ORS 197.763(3)(a)-(f). A copy of the staff report must be made available at least seven days before the hearing. ORS 197.763(3)(i).

Petitioners assert that despite the fact the local hearing process resulted from a LUBA remand, a formal application for a forest template dwelling was required, but not submitted by intervenor. Petition for Review 21. Absent a formal application, petitioners assert that they were given insufficient information concerning the applicable approval criteria prior to the initial evidentiary hearing, and as a result lost the benefit of the additional time to

prepare their case in advance of that hearing. Petitioners argue that the one-page Zoning Permit 13-66 fails to address standards or provide a dwelling type and assert they were left to make arguments concerning all the potential dwelling types in order to protect their interests. Petition for Review 22, Record 55-1–55-2.

We agree with intervenor that the application that resulted in the issuance of Zone Permit 13-66 reflects the application being reviewed in this appeal. Response Brief 10. Petitioners have not shown that the lack of an application detailing the applicable criteria in advance of the evidentiary hearing resulted in prejudice to them. The law does not require that the public receive all the application material at the time the notice is given, but rather that the public be provided an opportunity to respond when additional information is later submitted. *1000 Friends of Oregon v. Lane County*, 102 Or App 68, 73, 793 P2d 885 (1990). The county's approach may not have been the most efficient for petitioners but, as intervenor notes, petitioners were aware of the applicable criteria, actively participated in the proceedings and submitted voluminous documents during the period between the evidentiary hearing and the close of the record to new evidence, indicating a lack of prejudice. Response Brief 14. *See Furler v. Curry County*, 27 Or LUBA 546, 550 (1994) (where record shows petitioner was aware of criteria and participated effectively in the hearing, there is no prejudice to petitioner's substantial rights). Petitioners have failed to establish prejudice to their substantial rights.

The first subassignment of error is denied.

B. Second Subassignment of Error

ORS 197.763(6) provides, in part:

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

Petitioners view the second and first subassignment as related for purposes of establishing that they were in fact prejudiced by the county process. Petitioners argue that they encountered difficulty obtaining and therefore responding to intervenor's evidence submitted prior to and during the hearing, and during the open record period, and this difficulty prejudiced their substantial rights. Petition for Review 23. Petitioners believe intervenor submitted material slowly. Petition for Review 24. Petitioners also believe the county's actions made it difficult for petitioners to obtain submitted materials. *Id.* As a result, petitioners argue they

needed "more time to obtain documents, discover rebuttal evidence, and formulate responsive arguments." *Id.*

Petitioners' allegation that the county largely ignored their concerns relating to access to materials is not supported by the record. Accordingly, petitioners have not established that the county committed a procedural error. *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006) (Petitioner alleging procedural error must identify both the procedure violated and the prejudice to his substantial rights.)

The day after the first and only evidentiary hearing, counsel for petitioners asked county counsel for documents submitted by intervenor at the hearing. Record 41-2. Near the close of business that day, county counsel responded that the documents would be available for pick-up the next day. *Id.* Counsel for petitioners then asked for guidance about how to best obtain documents submitted into the record in the future. *Id.* County counsel advised that it was fine to go directly to county staff but to place the requests in writing so that she would have "a paper trail" for her file. *Id.*

Then, after learning that an *ex parte* contact between one of the petitioners and a county commissioner occurred, county counsel asked petitioners' counsel that those requests be made by petitioners' counsel. Record 41-1, 36-3. Petitioners argue that county counsel's request increased their legal costs; however, at the time petitioners' counsel responded "[t]hat seems fair." Record 36-3. Each of these events occurred before petitioners' attorney sent county

counsel an email in which he also confirmed to county counsel that the draft open record period schedule was satisfactory. Record 36-1.

Petitioners argue that they lacked sufficient time to obtain a survey, to validate or contradict intervenor's witness statements, or to investigate the legality of one of the three dwellings that intervenor relied on to satisfy the forest template dwelling criteria–the house on TL 3300. Petition for Review 26. Petitioners have not established that the method that the county established for obtaining documents submitted into the record violated any procedure, or that their substantial rights were prejudiced by the method. Petitioners have also failed to establish that they asked for more time to respond and that the county rejected the request. During the open record period, petitioners submitted evidence related to the application issues and, as intervenor notes, there is not an endless right to submit and respond to evidence. *Friends of Hood River Waterfront v. City of Hood River,* 67 Or LUBA 179, 195 (2013). Petitioners have not established that they were prejudiced by any of the county's actions described above.

This subassignment of error is denied.

C. Third Subassignment of Error

Petitioners argue that the county erred in accepting new evidence from intervenor without affording petitioners an opportunity to respond to that evidence. Petition for Review 26. For the reasons set forth below, we agree, in part.

Following petitioners' request that the written record be kept open after the evidentiary hearing, the county kept the record open, consistent with ORS 197.763(6)(a) and (c). The record remained open longer than seven days after the evidentiary hearing so that the parties had at least seven days to respond to the staff report issued after the hearing. Record 36-1.

Consistent with ORS 197.763(7), the record remained open until May 14, 2018, for evidence responsive to that submitted during the open record period ending May 7, 2018. *Grahn v. City of Yamhill*, 76 Or LUBA 258, 268 (2017) ("[A]ny rebuttal evidence * * * must be limited to evidence to 'respond to new evidence submitted during the period the record was left open.'" (Quoting ORS 197.763(6)(c).)). Intervenor's May 14, 2018 submittal addressed criticisms raised by petitioners' surveyor concerning the use of general data rather than a survey and made changes to the initial template in response to petitioners' surveyor's critique. Petitioners' surveyor agreed with the conclusion in *Linker v. Multnomah County*, 38 Or LUBA 84, 90 (2000) that a variety of methods may be used to center the forest template and stated that he believed the centering method used by intervenor's expert was reasonable after mathematical corrections. Record 24-5. In response, intervenor made changes to his initial calculation and submitted analysis using a variety of centering approaches as discussed in the *Linker* case cited by petitioners' expert. Record 20-3–20-8.

Prior to May 7, 2018, intervenor submitted one template using the center point method. Accordingly, in response to that submittal, petitioners focused on

the submitted center point method in their analysis and submissions opposing the template dwelling. In their submittal on May 7, 2018, petitioners' surveyor also noted in his critique of intervenor's submittal that a variety of methods are acceptable for determining center. Record 24-1–24-8. Intervenor's May 14th submittal included new template studies, including a revision of his prior center point analysis, as a response to the critique previously submitted by petitioners on May 7, 2018. Record 20-1–20-8. There was arguably a lack of clarity concerning the scope of material the county would accept through May 14,2018.[3]

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[3] It appears that there may have been some confusion surrounding what type of material could be submitted at various stages of the local process. Prior to the April 18, 2018 hearing, petitioners requested that the record remain open for at least seven days after that initial evidentiary hearing. Record 48-2–48-5. At the end of the April 18, 2018 evidentiary hearing, the chair announced that the record would remain open until 5:00 pm on April 25, 2018 for submission of new material but "[n]o new material will be accepted from any individual other than the applicant after that time." Record 45-9. Because the board requested a staff report on the template test and county counsel wanted everyone to have at least ten days to review the staff report, the schedule was extended and the record remained open for more than seven days. Record at 35-2. The April 23, 2018 email from the county counsel advised counsel for the parties that the record would remain open generally until May 7, 2018, and between May 7, 2018 and May 14, 2018, the county would receive material responsive to intervenor's submittals. The May 7, 2018 board meeting minutes report, however, that the county counsel advised the board that material would be accepted until May 14, 2018, and between May 14, 2018 and May 21, 2018, intervenor's counsel would be allowed to submit a response to or rebut previously submitted material, explaining:

The additional template analysis submitted by intervenor was, however, appropriate. "[A]lthough the legislature could have used the word 'rebut' in ORS 197.763(6)(c) and (7), it instead drafted them to allow 'any participant' to submit 'new evidence, argument or testimony,' to 'respond' to any new evidence that was submitted during the ORS 197.763(6)(c) seven-day open record period." *Friends of Hood River Waterfront*, 67 Or LUBA at 195. The additional templates were new evidence responding to petitioners' evidence and properly allowed.

Pursuant to ORS 197.763(6)(e) the local government shall allow the applicant at least seven days after the record is closed to all others to submit final written argument. No new evidence is allowed. Petitioners challenge county consideration of an email from contractor Ed Minalia (Minalia) to Michael Eng (petitioner) (the Minalia Email), which intervenor submitted with his final written argument on May 21, 2018. Petition for Review 28, Record 17-1–17-4.

> "The new schedule had also been presented to the parties and agreed upon by all. The new timeline would set May 7, 2018 for the record to close at 5:00 pm for any new material by anyone. The record would remain open until May 14, 2018 at 5:00 pm for submissions with limited purposes; no additional general public comment will be accepted into the record during this time. Only submission[s] pertaining to the template test will be allowed. The final record will close on May 21, 2018 at 5:00 pm. This time frame is for Ms. Rebecca Knapp to submit response to or rebut any material submitted while the record was open and Ms. Knapp cannot present any new arguments or raise any new issues." Record 27-4.

Minalia wrote:

> "Hope this helps. After Chuck and Bert Link's house went into litigation in the late Fall of 1992, I applied for my contractor license. In February of 1993, I helped finish the house which had already been framed up. I did some sheetrock work, taping and mudding and trim work. After thinking about our conversation, I remembered that when I started working under my contractor license, they were living in the house. They could easily [have] been living in the basement in 1992.
>
> "If you have any other questions, please give me a call." Record 17-4.

Minalia attached to his email a proposal for work on the TL 3300 dwelling, dated February 16, 1993, and an invoice showing payments between February and May 1993. On May 14, 2018, petitioners submitted the work order and invoice into the record, without the cover email. Petitioners argued that work began on the house in the Fall of 1992, stopped due to winter and problems with Romar Construction and that the submitted "bookkeeping record show[ed] that work resumed on the [house] in February of 1993 and continued through May 20, 1993." Record 19-1, 19-3,19-26–19-27. Petitioners then argued that when the house was finally complete, the owner filed a completion notice with the county. Record 19-3. The Minalia Email was included with intervenor's May 21, 2018 submittal of final argument and was provided to rebut the argument petitioners made based on the attachments petitioners previously placed into the Record on May 14, 2018. Record 17-2. Evidence, in the context of a quasi-judicial hearing is defined as "facts, documents, data or other information offered

to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision." ORS 197.763(9)(b). Argument concerns the "assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. 'Argument' does not include facts." ORS 197.763(9)(a). Intervenor argues that the Minalia Email was intended to provide context for the attachments submitted by petitioners and thereby rebut petitioners' arguments concerning those attachments. Response Brief 19. Petitioners argue that the Minalia Email was evidence, the county relied on that evidence in making its decision, and petitioners were entitled to respond to the Minalia Email.

We agree with petitioners. The county ultimately relied upon the Minalia Email in its findings, holding that Mr. Minalia's firsthand knowledge of the status of the dwelling on TL 3300 was relevant and credible.[4] Finding No. 17 is:

> "The statement of Ed Minalia regarding his firsthand knowledge of the status of the dwelling on Tax Lot 3300 is relevant and credible

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[4] The board of county commissioners met three days after intervenor's May 21, 2018 submittal. The minutes of the board deliberation on May 24, 2018 reflect the fact that Chair Todd Nash (Nash) advised at the meeting's outset that no written or oral input would be accepted from the parties. Record 14-1. The minutes summarize a statement by Commissioner Susan Roberts (Roberts) that "[t]he email from Mr. Minalia simply states that he was inside the dwelling doing some work." Record 14-5. The minutes also reference a statement from Chair Nash that "he concurs with Commissioner Roberts considering the statement of the person living [in the dwelling on TL 3300] and Minalia's statement of conducting finish work on the dwelling early on in the year." Record 14-5.

> based on his status as being present and involved in the construction work on the dwelling. There is no showing that Mr. Minalia has any bias or interest in the outcome of this matter. Record 4-4.

Finding No. 18 is:

> "The declaration of applicant Steve Bilben is based on firsthand knowledge and actual presence in the dwelling on Tax Lot 3300 prior to January 1, 1993, and is credible even taking into consideration his personal interest in the outcome of this hearing as it is corroborated by the statements of Mrs. Cook and Mr. Minalia." *Id.*

We also disagree with intervenor that petitioners are precluded from raising the county's consideration of the Minalia Email as procedural error because petitioners failed to object to the Minalia Email during the local proceeding. As a general matter

> "Any right that petitioner may have to rebut new evidence under *Fasano [v. Washington County Comm.*, 264 Or 574, 507 P2d 23 (1973)] or ORS 197.763(6)(b) requires that petitioner contemporaneously assert that right of rebuttal at the time new evidence is submitted, so that the local government can rule on the merits of the request and allow an appropriate opportunity for rebuttal where such opportunity is warranted." *Frewing v. City of Tigard*, 47 Or LUBA 331, 338 (2004).

We have held, however, that where evidence was submitted with the final legal argument, neither the hearing nor the time before adoption of the final decision provided petitioners with an opportunity to make their objections known to the city council. *Brome v. City of Corvallis,* 36 Or LUBA 225, 234, *aff'd Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999), *abrogated on other grounds by Church v. Grant County*, 187 Or App 518, 69 P3d 759

(2003). We held in *Brome* that the party challenging evidence improperly included with legal argument is not required to make a written request to respond to the evidence. *Id.* at 234. Rather, on appeal to LUBA, the petitioners must demonstrate "that they objected to the procedural error below, if there was opportunity to do so" and the error prejudiced their substantial rights. *Id.* The opportunity to provide comments must be meaningful.

No testimony was accepted during the May 24, 2018 deliberations, and petitioners did not have an opportunity to make objections related to the Minalia Email during the May 24, 2018 deliberations. County counsel's June 12, 2018 email to counsel for petitioners and intervenor states:

> "This matter is set on [] June 18 for the Board to consider the findings and any objections or requests for modification, and we are clearly within the 10 day time frame I had hoped to provide for everyone to review.
>
> "* * * * *
>
> "Will your clients agree to waive the 10 day review time frame so this can be entertained on Monday?" Record 13-1.

Petitioners did not respond to the county counsel email and the board did not act on the findings until June 29, 2018. Record 5-1. The opportunity to review draft findings was not a meaningful opportunity to participate.

In *Horizon Construction Inc. v. City of Newberg,* 114 Or App 249, 252-53, 834 P2d 523 (1992), a member of the city council did not disclose an *ex parte* contact before the first meeting following the *ex parte* contact. Instead, disclosure

occurred after the evidentiary record was closed, and at the meeting where final action was taken. The court of appeals reversed and remanded LUBA's decision that "a petitioner is not excused from entering an objection to the procedural error on the ground that the local evidentiary record had previously been closed and there was no scheduled opportunity for public input at the meeting in question." *Id.* at 253. The court of appeals concluded that "an objection by petitioner here would not have been likely to cure the prejudice that it suffered from the disclosure violation. An objection to the timeliness of the disclosure at the * * * meeting, at which the council made its decision, could not have cured the city's antecedent failure to follow the statutorily required procedures to assure that petitioners have the opportunity to respond to the *ex parte* communication while evidence was still being prepared and presented. *Id.* at 253-54.

Petitioners' preview of the county's draft findings did not provide a forum to object, because at that point the board of commissioners had made its oral decision, the record was closed, and no further testimony was allowed. Although the county provided petitioners and intervenor with draft findings of fact and conclusions of law for their input and review prior to the issuance of its final decision, the opportunity to object was provided on June 12, 2018, after the city council had considered evidence and deliberated. Petitioners were not required to raise their objection after the record closed, during that period before the board deliberation hearing on May 24, 2018, or during the June 29, 2018 board meeting at which findings were adopted. As the court of appeals explained in *Horizon*,

ORS 227.180 requires that a government official disclose an *ex parte* communication at the first hearing following the communication in order to provide participants in the public process with an opportunity to learn of and respond to the evidence contained in the *ex parte* communication while the governing body is still receiving and evaluating evidence. *Horizon*, 114 Or App at 253. ORS 197.763 sets forth the process for introduction of evidence, responsive evidence and final legal argument in a quasi-judicial process. ORS 197.763 establishes a structure for the submission of evidence and advises participants in the process of the review framework, enabling them to effectively participate in the process. We held in *Brome* that neither the hearing at which the governing body deliberated nor the period between the hearing and the governing body's final decision provided petitioners with an opportunity to let that governing body know of its objection to the admission of evidence with final legal argument "at a significant stage" in the process. *Brome*, 36 Or LUBA at 234.

Petitioners' preview of the county's draft findings did not provide a forum to object, because at that point the board of commissioners had made its oral decision, the record was closed, and no further testimony was allowed. Although the county provided petitioners and intervenor with draft findings of fact and conclusions of law for their input and review prior to the issuance of its final decision, the opportunity to object was provided on June 12, 2018, after the city council had considered evidence and deliberated. Petitioners were not given an

opportunity to respond to the Mignalia Email at a significant stage in the process. Petitioners were not required to raise their objection after the record closed, during that period before the board deliberation hearing on May 24, 2018, or during the June 29, 2018 board meeting at which findings were adopted.

The third subassignment of error is sustained. On remand, the county must reopen the record and afford petitioners an opportunity to respond to the Minalia Email.

The first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

As noted, intervenor relied on the dwelling located on TL 3300 as one of the three dwellings necessary to qualify intervenor's property for a forest template dwelling. Petitioners' second assignment of error is that the findings are inadequate to support the county's conclusion that a lawful dwelling existed on TL 3300 on January 1, 1993, and that the record lacks substantial evidence to support that finding. Petition for Review 30. Petitioners break their assignment of error into three parts. First, petitioners argue that the county's findings are inadequate because they fail to explain how the house on TL 3300 qualified as a "dwelling" under the WCLDO definition. Second, petitioners argue that the county's decision that the house on TL 3300 "existed" on January 1, 1993 is not supported by adequate findings or by substantial evidence. Third, petitioners argue that the county's conclusion that the house on TL 3300 was "lawfully established" is not supported by substantial evidence.

Petitioners have cited no authority to support their argument that, for purposes of the forest template dwelling test, the dwellings relied upon must be "lawfully established." The county appears to have accepted that argument, and intervenor does not cross-assign error to the county's conclusion that intervenor was required to demonstrate that the dwellings relied upon were lawfully established. We are not aware of any statutes, administrative rules, or case law addressing this particular issue. *But see West v. Multnomah County*, 70 Or LUBA 235 (2014), *aff'd*, 269 Or App 518, 350 P3d 203 (2015) (observing that neither the forest template dwelling statute nor the rule define the key term "dwelling," and neither the statute nor the rule explicitly address whether a long abandoned, derelict structure may qualify as a "dwelling," for purposes of qualifying for a forest template dwelling).

In *Friends of Yamhill County v. Yamhill County*, 58 Or LUBA 315, *aff'd*, 229 Or App 188, 211 P3d 297 (2009), we interpreted the term "parcel" in ORS 215.750. ("All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract[.]"). In interpreting the term "parcel" in ORS 215.750, we referred to the definition of "parcel" in ORS 215.010(1), which includes units of land that have been "lawfully established." *Id.* at 319. From there, we concluded that only "lawfully created" parcels may be counted in determining whether the requirements of forest template dwelling statute have been met. We determined

that "lawfully created" means created in compliance with applicable partitioning laws or created prior to the enactment of those laws. *Id.* at 321.

Differently, the term "dwelling" in ORS 215.750 is not defined in ORS 215.010 or OAR 660-006-0005. The WCLDO defines "dwelling" as follows:

> "One or more rooms containing one kitchen and occupied by one family. A dwelling shall not be used as a rental for vacation or resort occupancy unless approved under other provisions of this ordinance. It may be referred to as a residence. A modular home is considered a dwelling under the terms of this ordinance."

WCLDO 1.065.040; *see also* WCLDO 1.065 (setting out definitions for the WCLDO). Counties are permitted to regulate forest lands more stringently than required by ORS 215.750(1)(c) or OAR 660-006-0027(3)(c). *Miller v. Multnomah County*, 153 Or App 30, 38-40, 956 P2d 209 (1998). However, the definition of "dwelling" in WCLDO 1.065.040 does not require that a dwelling be lawfully established. Because the parties do not dispute the point, we assume without deciding that intervenor was required to demonstrate that the three dwellings he relied upon to satisfy the forest template dwelling test were lawfully established dwellings that existed on January 1, 1993. We understand "lawfully" in this context to mean that any applicable land use approvals were obtained.

The record contains competing evidence as to the existence of a lawful dwelling on TL 3300 on January 1, 1993. For the reasons amplified below, we agree that although there was sufficient evidence for the county to conclude that there was not a dwelling on TL 3300 on January 1, 1993, had it so chosen, there

was also substantial evidence upon which the county could base its conclusion that a dwelling did exist on TL 3300 on the operative date. The findings, however, are lacking.

A. The Findings Fail to Explain How the House on TL 3300 Qualifies as a "Dwelling" in Existence January 1, 1993 and Fail to Identify Evidence Supporting that Conclusion

Petitioners argue that the challenged decision lacks adequate findings as to what a "dwelling" is and whether a structure on TL 3300 was a "dwelling" on January 1, 1993. As noted, WCLDO 1.065.040 defines dwelling as "[o]ne or more rooms containing one kitchen and occupied by one family." For the other two dwellings that the county relied on to qualify the subject property for a forest template dwelling, the county referenced this definition. Finding No. 10 states: "There was a dwelling, as that term is defined in [WCLDO1.065.040], on [TL] 300 prior to January 1, 1993." Record 4-3. Finding No. 12 states: "There was a dwelling, as that term is defined in [WCLDO 1.065.040], on [TL] 3400 prior to January 1, 1993." *Id.* However, Finding No. 14 notes that there was conflicting evidence as to whether there was a dwelling on TL 3300 prior to January 1, 1993, but the county does not clearly state that the county is applying the same definition of dwelling to the structure on TL 3300 as it applied in the earlier findings. *Furler,* 27 Or LUBA at 552 (where local interpretation is unclear, LUBA will remand for clarification).

Where specific issues are raised concerning compliance with applicable criteria, the findings must address those issues. *Norvell v. Portland Metropolitan*

Area Local Government Boundary Commission, 43 Or App 849, 853, 604 P2d 896 (1979). The county findings do not indicate that it concluded that a structure on TL 3300 on January 1, 1993 met the code definition of "dwelling" and had a kitchen and at least one additional room or otherwise explain why the dwelling on TL 3300 could be used to qualify the subject property for a forest template dwelling.

This subassignment of error is sustained.

B. The Record Contains Substantial Evidence that the Dwelling on TL 3300 was in Existence on January 1, 1993 but the Findings are Inadequate

Petitioners and intervenor agree that lawful dwellings existed on TL 300 and TL 3400 as of January 1, 1993. Qualifying for a forest template dwelling requires, however, establishing that three dwellings currently in existence were present on lots within the 160-acre template on January 1, 1993. Whether or not the dwelling on TL 3300 existed on January 1, 1993 was hotly contested with evidence presented on both sides of the issue because absent proof of a third dwelling, the forest template dwelling could not be approved. The parties agree that construction of the house on TL 3300 began in 1992 but dispute when it was constructed so far as to constitute a "dwelling."

Finding No. 15 states that an owner of TL 3300 at the time in question credibly testified as to the existence of a dwelling on the property as of January 1, 1993. Record 4-3. The owner sent intervenor's counsel an email stating "I'm writing to let you know that after going back, and thinking about when my house

was finished, I can tell you with[ ]out hesitation that my house was done in 1992." Record 26-4. Finding No. 18 is that the county found intervenor's declaration "based on firsthand knowledge and actual presence in the dwelling on [TL] 3300 prior to January 1, 1993" to be credible. Record 4-4. Intervenor explained in his declaration that he met with an owner of the dwelling on TL 3300 prior to January 1, 1993 to discuss taxidermy and that the owner of the dwelling went to the kitchen and returned with a drink while intervenor was there, indicating both the presence of a kitchen (the room with the refrigerator) and at least one other room (the living room where they were meeting.) Record 26-8.

Evidence from petitioners that the TL 3300 dwelling did not exist on January 1, 1993 included rebuttal of intervenor's testimony that he had been in the TL 3300 dwelling before January 1, 1993 to discuss taxidermy based on the fact that the owner of the home did not have a taxidermy license in 1992, evidence that a completion report for the dwelling was filed on June 14, 1993, evidence of a 1993 lien filed on the property stating that work had been completed on January 11, 1993, and statements by adjacent landowners or their guest that the dwelling was not in existence on January 1, 1993. Petitioners argued that the county had to weigh this evidence against the competing evidence and if properly weighted, it would not be possible to conclude that the TL 3300 dwelling existed on January 1, 1993. Petition for Review 31-37.

Petitioners did not submit evidence that called into question that evidence submitted by intervenor to such an extent that the county could not reasonably

make the decision it made. *Willamette Oaks, LLC. v. City of Eugene,* 67 Or LUBA 351, 366-367, *aff'd*, 258 Or App 534, 311 P3d 527 (2013) (Substantial evidence is evidence a reasonable person would rely on in making a decision; in weighing conflicting testimony, the question is whether one side raises issues or questions that so undermine the other side that only one conclusion may be reached.) The county was entitled to make the choice between conflicting evidence. *Id.* at 371.

The county found that the lien does not establish that the dwelling was not in existence on January 1, 1993 and the completion notice filed in June of 1993 does not prove completion did not occur by January 1, 1993. Record 4-4. Evidence that the TL 3300 dwelling existed on January 1, 1993 and which the county found to be more credible than that submitted by petitioners includes the statement from the prior owner of TL 3300 that the dwelling was in place on January 1, 1993. *Id.* The county found that recollection from the prior owner of TL 3300 to be based on firsthand knowledge, and therefore more likely to be accurate than the recollection of others. Record 4-3. The county also found that the statement of intervenor that he had visited the TL 3300 dwelling before January 1, 1993 credible even though, as applicant, he had an interest in the proceeding. Record 4-3.

The county also found, however, that intervenor's statement was corroborated by the statements of the prior owner of TL 3300 and the Minalia Email. Record 4-4. The findings rely on the Minalia Email which, as we explain

above, was accepted after the record had closed and as part of intervenor's final argument. *Id.* We cannot determine whether the county would have reached the same conclusion without the Minalia Email.

Further, the county included in its Finding No. 23, a reference to a statement by the tax assessor "that Assessor's records show that [TL] 3300 showed a dwelling in place for tax purposes on January 1, 1993, and that would only have been the case had a lawful dwelling been established on the real property prior to that date." Record 4-4. Finding No. 23 does not address evidence presented by petitioners that due to a change in tax law, the inclusion of an improvement on the tax rolls in 1993, evidenced existence of the house as of July 1993, not January 1993. The county findings should have addressed this evidence. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92, 97 (2015) (County findings must address alleged inconsistencies in the record.)

This subassignment of error is sustained.

C. The Record Contains Substantial Evidence that the House on TL 3300 is Lawful

Intervenor does not dispute petitioners' contention that in order to be counted for purposes of the forest template dwelling approval, the dwellings on TL 300, 3400 and 3300 must be lawful. Petition for Review 38, Response Brief 26.

The parties do not dispute the lawfulness of the dwellings on TL 300 and 3400, but petitioners argue that even if the TL 3300 dwelling existed on January

1, 1993, the record failed to establish that the dwelling was lawfully established. Petition for Review 38.

The parties agree that if the dwelling was legally constructed, the county would have issued a zoning permit. The county was unable to locate a zoning permit for the TL 3300 dwelling in its records and petitioners asserted that the dwelling was not legally constructed. County staff advised the board that over the years, various records had been lost through things like computer system updates, and that the lack of a zoning permit did not mean that a zoning permit had not been issued. "Evidence was presented from County Planning staff that the records of permits such as this have been lost, misplaced, or otherwise become unavailable over time due to a variety of issues, and the inability to locate it at this time does not indicate one was not issued." Record 4-5 (Finding No. 25).

Rather than assume that the dwelling was illegally constructed, the county relied upon testimony from the tax assessor and stated in Finding No. 26 that "it is the issuance of a zone permit that triggers the Assessor's office's actions in appraising a subject property and changing the property's status on the tax rolls. Had there been no zone permit issued for a dwelling on [TL] 3300, the Assessor's office would not otherwise have known to conduct an appraisal and add it to the tax rolls in 1993." Record 4-5.

Petitioners argue that the record lacks necessary evidence of the county's approval, so the application must be denied. *Lovinger v. Lane County*, 51 Or LUBA 29, 41, *aff'd*, 206 Or App 557, 138 P3d 51 (2006), *rev den*, 342 Or 254

(2007) (citing *Strawn v. City of Albany,* 20 Or LUBA 344, 350 (1990) (It is the applicant's burden to establish that a lot used for the forest template test was lawfully created.) "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make the finding." *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

The burden is on intervenor to provide evidence in the record that any needed approval was obtained for development of the dwelling on TL 3300. We agree with intervenor that the statement from the tax assessor that issuance of a zoning permit is the trigger for an assessment visit, and that an assessment visit occurred is substantial evidence that the dwelling is lawful. By way of analogy, if an individual's birth certificate was unavailable but the individual submitted a statement from a newspaper that the newspaper had published a birth announcement in a given year and the only way the newspaper became aware of births was by reviewing birth certificates, one could make the inference that the newspaper reviewed the individual's birth certificate at some point prior to the publication of the birth announcement. A reasonable person could conclude from the tax assessor's statement that at one time there was a zoning permit available for review and the dwelling is lawful. On remand, the county must clarify its definition of dwelling for purposes of TL 3300 and identify the evidence the county relies on to determine whether the structure on TL 3300 was a dwelling as of January 1, 1993. The county must also explain the basis for its finding that

identification of a structure on TL 3300 on the 1993 tax rolls evidences existence of the structure on January 1, 1993, given petitioners' evidence concerning the change in tax law and assessment dates. In addition, the county must address evidence petitioners submitted concerning the Minalia Email and explain how that evidence relates to the county's conclusion as to the date the dwelling on TL 3300 came into existence.

This subassignment is denied.

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is that the county erred in its application of the template test and lacked sufficient data to conduct the template test. Petitioners argue that the challenged decision should have addressed "petitioners' submitted survey, accurate measurements, and survey reports that discredit [intervenor's] testimony and illustrate the surveyor errors." Petition for Review 44.

Petitioners allege that it was error to rely on approximate dimensions and imprecise GIS data. Petitioners did not identify any legal requirement that survey data be used in applying the template test but argued that in cases where the issue of whether a property was inside or outside the template was close, survey data was particularly important. Record 19-7. Intervenor's surveyor submitted testimony that use of survey level data was not common practice, but the findings do not reflect this or address petitioners' argument. Record 20-4. Finding No. 4

concludes that all the template exhibits were prepared by licensed surveyors and bore surveyor's stamps, but does not address the issue of the level of detail needed. Record 4-3.

Petitioners challenge both the initial center point method submitted by intervenor, and the Exhibit D template ultimately relied upon by the county. However, the county did not rely upon the initial center point analysis, and it and petitioners' challenges to its accuracy are not relevant here.

Finding No. 5 is "[t]he template test as applied in Exhibit D shall be used for the purposes of evaluating the scope of the properties subject to evaluation of Applicant's compliance with the Template Test, as that template appears most logical in review and application." Record 4-3. Petitioners argue that the method accepted by the county is unreliable under LUBA's holding in *Linker,* 38 Or LUBA at 92 n 4, where we noted in a footnote that we agreed with the hearings officer that the center point method incorrectly found the center because it did not account for the relative mass or area of the flag lot. "That is, the narrow strip pulls the center point farther north than its size in proportion to the main portion of the parcel would warrant." *Id.* Petitioners argue that it is error to use the center point method in this case because intervenor's property is oddly shaped, and like in *Linker*, use of the center point method similarly shifts the center of the tract unreasonably. Petition for Review 44. County Conclusion of Law No. 4 is:

> "There is no legal definition for how the center point/midpoint must be established for the purposes of applying the Template test under either Oregon state statutes or the Wallowa County Comprehensive

Land Use Plan, and the Board may choose any method so long as it is reasonable. The Board concludes as a matter of law that the template test as set forth in Exhibit D is reasonable."[5] Record 4-6.

Record 20-8 contains a plan view of the results using three different methods to find center. The county does not, however, explain the basis for its conclusion that the Exhibit D template is the most appropriate. The county should adopt findings explaining the basis for its template selection and addressing petitioners' argument challenging the center point method if it is selected.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners' fourth assignment of error is comprised of three challenges to the decision. We address each below.

A. Wildfire Standards

The county's decision includes the following statement at the conclusion:

"It is ordered that Zone Permit 13-66 will be approved subject to:

"[WCLDO] 16.025 – Property Development Standards; and

"* * * * *

"[WCLDO] Article 25 – Flood and Natural Hazard Area

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[5] We held in *Linker* that the law does not require a particular method for determining the center for purposes of the template test and that the county reasonably denied an application based upon the center of gravity and pin point test as opposed to the center point method petitioner set forth. ORS 215.705 (3)(c)(C) discusses circumstances in which an applicant may compel a governing body to use the geographic center of a flag lot to determine center.

Requirements[.]" Record 4-6.

We understand that statement to condition the county's approval of the application on a future determination of compliance with the listed WCLDO standards.

In their first subassignment of error, petitioners challenge the county's decision to approve the application "subject to * * * Article 25–Flood and Natural Hazard Area Requirements." Petitioners argue that the county impermissibly deferred a determination of compliance with the wildfire standards in WCLDO 25.090, through a condition of approval, to a future proceeding that does not provide for the notice and hearing required for permit decisions.

Intervenor responds initially that "[p]etitioners rely on [the] wrong version of Article 25." Response Brief 33. Intervenor then argues that the applicable provision of Article 25, at WCLDO 25.080(B)(2)(2001), requires the application to meet the standards in WCLDO 16.025(6). According to intervenor, the criteria in WCLDO 16.025(6) "do not require interpretation or judgment," and therefore the county's future determination of compliance with those standards is not required to be made in a proceeding that does provides for public participation. Response Brief 34.

We reject intervenor's argument. First, the county's decision makes the approval "subject to" *both* WCLDO "16.025 – Property Development Standards" and WCLDO "Article 25 – Flood and Natural Hazard Area Requirements." Neither the 2001 version of the WCLDO nor the 2018 version of the WCLDO is

entitled "Flood and Natural Hazard Area Requirements," but both versions include protection standards for wildfire.

More importantly, we reject intervenor's argument that the county may defer a determination of compliance with applicable approval criteria that is required to be made in *this* public proceeding to a future proceeding that does not allow for public participation, based on the theory that the deferred criteria "do not require interpretation or judgment." Nearly every application for land use approval will involve some applicable approval criteria that are more subjective than others, and other applicable criteria that do not require the exercise of much, if any, interpretation or judgment. But that does not mean that the county may defer its review of the second category of criteria to a non-public proceeding. The county must either determine in this decision whether the applicable wildfire standards are satisfied, or defer a determination of compliance with the applicable wildfire standards to a future process that allows public participation. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 448 (1992).

We also reject intervenor's argument that WCLDO 25.090(6) makes the planning director the initial and only reviewer of whether the standards are met, at the time a building permit application is submitted. WCLDO 25.090(7)(B)(3) provides that the "fuel-free break standards shall be completed and approved by the Planning Director prior to issuance of any septic, building, or manufactured dwelling permits." We understand that language to require (1) the fuel-free break standards to be completed as part of the preparation of the site for building, prior

to the issuance of a building permit and (2) the planning director to approve the completion of the fuel-free break. Absent any reference to planning director "approval" of the subject application's compliance with fuel-free break standards, we do not understand that language to grant the planning director approval authority over whether the application proposes fuel-free breaks that satisfy the standard.

We cannot tell from the county's cursory condition that makes its approval "subject to" applicable provisions of WCLDO Article 16 and Article 25, whether the county intends that a future determination of compliance with those applicable wildfire standards will be made in a proceeding that allows for public participation. On remand, the county should clarify its condition that makes its approval "subject to" compliance with applicable wildfire standards to confirm that its determination will be made in a proceeding that allows for public participation.

The first subassignment of error is sustained.

B. Wildlife Habitat Requirements

County Finding Nos. 28 to 32 find compliance with Article 28 wildlife habitat requirements based on an April 19, 2017 Oregon Department of Fish and Wildlife (ODF&W) letter. County Finding No. 29 determines, based upon a letter from ODF&W that "the construction of structure will not significantly inhibit or impact wildlife, constituting substantial evidence that [WCLDO] Article 28 standards are met." Record 4-5. Petitioners' reliance on an earlier letter is

misplaced as it has been superseded by the subsequent letter from ODF&W stating that the earlier letter should be disregarded. *Id.*

Petitioners argue that the later ODF&W letter should not be relied upon because it does not consider the impact of fire break requirements in WCLDO Article 25. Petition for Review 51. Petitioners do not cite a code requirement that fire break impacts be considered, or establish that the 2018 fire break standards apply. See *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 596 (2000) (holding a petitioner's assignment of error that the record does not show any attempt to coordinate with affected local governments fails when petitioner fails to identify any affected local governments). The county's findings are supported by substantial evidence. This subassignment of error is denied.

C. Access Standards

WCLDO 32.040.05 contains a cul-de-sac standard that petitioners argue applies to the application, and will not be met. Petition for Review 52. Petitioners have not provided a basis for us to conclude that the access standards apply to intervenor's application. This argument is insufficiently developed for review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) (Applicable standards must be identified to sufficiently develop an argument for review.). This subassignment is denied.

The fourth assignment of error is sustained, in part.

The county's decision is remanded.