

1                   BEFORE THE LAND USE BOARD OF APPEALS  
2                   OF THE STATE OF OREGON

3  
4                   JOYCE JACOBUS, PEGGY SUE JACOBUS,  
5                   JUDY DAHL, ANN FELBER, and KURT KNABKE,  
6                                   *Petitioners,*

7  
8                                   vs.

9  
10                   KLAMATH COUNTY,  
11                                   *Respondent,*

12  
13                                   and

14  
15                   CITY OF CHILOQUIN,  
16                                   *Intervenor-Respondent.*

17  
18                                   LUBA No. 2020-054

19  
20                                   FINAL OPINION  
21                                   AND ORDER

22  
23                   Appeal from Klamath County.

24  
25                   Courtney Johnson, Portland, filed the petition for review and argued on  
26                   behalf of petitioners. With her on the brief was Crag Law Center.

27  
28                   No appearance by Klamath County.

29  
30                   Mark S. Bartholomew, Medford, filed the response brief and argued on  
31                   behalf of intervenor-respondent. With him on the brief was Hornecker Cowling  
32                   LLP.

33  
34                   RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board  
35                   Member, participated in the decision.

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37                   REMANDED

12/10/2020

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

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**NATURE OF DECISION**

Petitioners appeal a county board of commissioners approval of an exception to Statewide Planning Goal 4 (Forest Lands), application of a Limited Use (LU) overlay, and issuance of a conditional use permit (CUP) to allow a wastewater treatment facility, lagoon storage of effluent, and application of effluent to a 211-acre parcel.

**MOTION TO TAKE EVIDENCE**

OR 661-010-0045(1) provides that LUBA may take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning standing “or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision.” Petitioners request that we take as evidence outside the record two declarations (the Knabke and Felber Declarations) submitted to establish standing and procedural irregularities related to the public hearing held by the county, which petitioners maintain caused prejudice to the substantial rights of some persons. Intervenor does not object to the motion to take evidence or challenge the standing of parties or dispute petitioners’ characterization of the proceedings. Although there is no factual dispute, we will consider the declarations.

**FACTS**

The 211-acre subject property is located approximately 1.75 miles northwest of the City of Chiloquin, is zoned Forestry, and is located within Elk

1 Winter Range. The city seeks to develop a wastewater treatment facility,  
2 including approximately 15 to 16 acres of wastewater treatment lagoons and an  
3 effluent sprinkler system for approximately 40 acres of the subject property.  
4 Petition for Review 4. In February 2020, intervenor submitted its application for  
5 a reasons exception to Goal 4, an LU overlay, and a CUP authorizing  
6 development of the project.<sup>1</sup> Subsequent to the application being submitted, the  
7 novel coronavirus pandemic struck and the Governor of Oregon issued Executive  
8 Order 20-12, designated as the “Stay Home, Save Lives” order, closing many  
9 businesses and government buildings and strongly encouraging the closure of  
10 others. The Governor subsequently issued Executive Order 20-16, designated as  
11 the “Keep Government Working” order, requiring public meetings to be  
12 conducted electronically where possible. On April 28, 2020, the planning  
13 commission and board of commissioners held a joint hearing on the application  
14 by teleconference using a video-conferencing program called WebEx. On May  
15 8, 2020, the board of commissioners approved the application.

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<sup>1</sup> Goal 4 is:

“To conserve forest lands by maintaining the forest land base and to protect the state’s forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.”

1 This appeal followed.

2 **FIRST ASSIGNMENT OF ERROR**

3 ORS 197.763(6)(a) provides:

4 “Prior to the conclusion of the initial evidentiary hearing, any  
5 participant may request an opportunity to present additional  
6 evidence, arguments or testimony regarding the application. The  
7 local hearings authority shall grant such request by continuing the  
8 public hearing pursuant to paragraph (b) of this subsection or  
9 leaving the record open for additional written evidence, arguments  
10 or testimony pursuant to paragraph (c) of this subsection.”

11 Petitioners argue that they requested a continuance of the April 28, 2020 hearing  
12 and that the county erred in denying their request. We agree with intervenor that  
13 petitioners did not request a continuance of the initial evidentiary hearing  
14 pursuant to ORS 197.763(6)(a).

15 Petitioners point to two documents in which they allegedly requested that  
16 the initial evidentiary hearing be continued. The first is an April 17, 2020 email  
17 from petitioner Judy Dahl to the planning director which states, “I would like to  
18 request you reschedule this public hearing to a time that will allow more input.”  
19 Record 78. We conclude that this is a request to reschedule the hearing, and not  
20 a request to commence and then continue the April 28, 2020 hearing to a later  
21 date.

22 Petitioners also point to an April 20, 2020 letter from petitioners Joyce and  
23 Peggy Sue Jacobus to the planning director which states, “Due to the coronavirus  
24 and the current stay at home order, we ask that you reschedule this hearing until

1 such a time when all in the community, have been notified and can attend.”

2 Record 94. The letter also states:

3 “In closing, we would like to humbly ask that you reschedule these  
4 hearing[s] until such a time everyone in the town of Chiloquin has  
5 been properly notified 1.) of the hearings; 2.) what the actual cost to  
6 them will be for each of the three sewer treatment options (This is  
7 only fair when a large number of Chiloquin residents will not even  
8 be using this sewer system.); and 4.) [*sic*] a time when everyone can  
9 attend these hearings. As a number of land owners do not have a  
10 technical computer knowledge base, they should be able to appear  
11 in person.” Record 96.

12 We conclude that this letter is also a request to reschedule the hearing, and not a  
13 request to continue a previously-commenced hearing.<sup>2</sup> Petitioners Dahl and  
14 Jacobus participated in the initial evidentiary hearing by submitting written

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<sup>2</sup> A transcript of the April 28, 2020 hearing provided by petitioners reflects that, at the hearing, the planning director characterized the Jacobuses’ letter as a request for a continuance:

“Um, in the letter from the Jacobus[es] they requested a continuance of this meeting, due to the corona virus, ah they want to be here in person to testify and did not feel that this was, they did not feel comfortable doing so today. So they’re asking for a continuance of this, ah our county counsel has weighed in and felt that we are following the procedures outlined in the Governor’s executive order so there’s no mandatory reason to do a continuance.” Petition for Review App 2 at 2.

The planning director’s mistaken reference to the Jacobuses’ letter as a request for a “continuance” does not establish that petitioners in fact requested a continuance when the letter itself requested that the hearing be “reschedule[d].” Record 96.

1 comments. They did not, however, request a continuance of an already-  
2 commenced hearing pursuant to ORS 197.763(6)(a).

3       Additionally, even if petitioners had requested a continuance, a procedural  
4 error is not a basis for reversal or remand unless the petitioners show prejudice  
5 to their substantial rights. *Eng v. Wallowa County*, 79 Or LUBA 421, 427-28  
6 (2019). Because the county closed its offices as a coronavirus precaution,  
7 petitioners allege that they had less than three weeks to seek remote review of  
8 application materials and prepare testimony. Petitioners argue that, if the hearing  
9 had been rescheduled to a date later than April 28, 2020, they would have had  
10 more time to prepare for the hearing, develop arguments, and retain legal counsel.

11 The Knabke and Felber Declarations both state:

12       “Because I did not have adequate time to understand the gravity of  
13 the situation, to review the record, and to retain counsel to represent  
14 my interests I did not testify at the April 28, hearing. Had the hearing  
15 been postponed, I would have participated in the hearing. Instead,  
16 the hearing was held as planned and we learned that after testimony  
17 was taken, the Planning Commission denied the request for a  
18 continuance and voted to approve the project.” Knabke Declaration  
19 3; Felber Declaration 3.

20 However, the declarations do not state that petitioners Knabke and Felber relied  
21 on the requests that the hearing be rescheduled. Rather, they state that the  
22 declarants did not understand the importance of the hearing.

23       Petitioners also argue that new information was presented at the hearing to  
24 which they were not allowed to respond. However, the Knabke and Felber  
25 Declarations do not identify the new evidence that was presented at the hearing

1 or identify additional evidence that the declarants would have submitted had they  
2 been allowed to do so. Petitioners have not established that their substantial rights  
3 were prejudiced.

4 Lastly, petitioners argue that conducting the hearing via WebEx resulted  
5 in meeting participants having difficulty hearing other participants and the  
6 proceedings in general, resulting in confusion on petitioners' part as to when to  
7 testify. Petitioners do not argue that they themselves were unable to provide  
8 testimony. To the extent petitioners argue that other potentially interested people  
9 were unable to participate, petitioners may not rely on an alleged injury to the  
10 substantial rights of another to establish that a procedural error has occurred. *See*  
11 *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488, 507-08 (2016).

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 Petitioners' second assignment of error is that the county misconstrued the  
15 applicable law and adopted inadequate findings to justify a Goal 4 exception.

16 **A. First Subassignment of Error**

17 ORS 197. 732(2) and (4) provide, in part:

18 “(2) A local government may adopt an exception to a goal if:

19 “ \* \* \* \* \*

20 “(c) The following standards are met:

21 “(A) Reasons justify why the state policy embodied in  
22 the applicable goals should not apply;



1 “(B) Areas that do not require a new exception cannot  
2 reasonably accommodate the use;

3 “(C) The long term environmental, economic, social  
4 and energy consequences resulting from the use  
5 at the proposed site with measures designed to  
6 reduce adverse impacts are not significantly  
7 more adverse than would typically result from  
8 the same proposal being located in areas  
9 requiring a goal exception other than the  
10 proposed site; and

11 “(D) The proposed uses are compatible with other  
12 adjacent uses or will be so rendered through  
13 measures designed to reduce adverse impacts.

14 “\* \* \* \* \*

15 “(4) *A local government approving or denying a proposed*  
16 *exception shall set forth findings of fact and a statement of*  
17 *reasons that demonstrate that the standards of subsection (2)*  
18 *of this section have or have not been met.” (Emphasis added.)*

19 OAR 660-004-0020(2)(a) implements ORS 197.732 and Goal 2, and provides:

20 “The four standards in Goal 2 Part II(c) required to be addressed  
21 when taking an exception to a goal are described in subsections (a)  
22 through (d) of this section, including general requirements  
23 applicable to each of the factors:

24 (a) “‘Reasons justify why the state policy embodied in the  
25 applicable goals should not apply.’ *The exception shall set*  
26 *forth the facts and assumptions used as the basis for*  
27 *determining that a state policy embodied in a goal should not*  
28 *apply to specific properties or situations, including the*  
29 *amount of land for the use being planned and why the use*  
30 *requires a location on resource land[.]” (Emphasis added.)*

31 Petitioners argue that the board of commissioners erred because it did not adopt  
32 findings of fact and state the reasons supporting its approval of the Goal 4

1 exception. Petition for Review 13. We agree that the board of commissioners  
2 failed to adopt required findings.

3 The findings and conclusions adopted to justify a goal exception must  
4 include not only findings setting out the facts that support a goal exception, but  
5 also a statement of reasons explaining why the facts found lead to the conclusion  
6 that the applicable exception criteria are satisfied. *DLCD v. Douglas County*, 17  
7 Or LUBA 466, 471 (1989). The board of commissioners' decision does not  
8 include findings of fact or law.

9 Intervenor argues that the board of commissioners adopted the staff report  
10 findings and findings prepared by intervenor. In *Gonzalez v. Lane County*, we  
11 held:

12 “[I]f a local government decision maker chooses to incorporate all  
13 or portions of another document by reference into its findings, it  
14 must clearly (1) indicate its intent to do so, and (2) identify the  
15 document or portions of the document so incorporated. A local  
16 government decision will satisfy these requirements if a reasonable  
17 person reading the decision would realize that another document is  
18 incorporated into the findings and, based on the decision itself,  
19 would be able both to identify and to request the opportunity to  
20 review the specific document thus incorporated.” 24 Or LUBA 251,  
21 259 (1992) (footnote omitted).

22 The ordinance approving the exception states:

23 “**WHEREAS**, based on testimony entered and in consideration of  
24 the whole record, the Klamath County Planning Commission  
25 accepted [intervenor’s] responses to each criterion provided in the  
26 Burden of Proof Statements as Findings of Fact and with the  
27 Findings in the Staff Report recommended approval to grant an  
28 exception to the Statewide Forestry Goal and establishment of a

1 limited use overly to allow a wastewater treatment facility, lagoon  
2 storage of effluent [*sic*] and application of effluent and, said  
3 recommendation was forwarded to the Klamath County Board of  
4 Commissioners; and

5 **“WHEREAS, the Klamath County Board of Commissioners voted**  
6 **to approve the Planning Commission recommendation to grant an**  
7 **exception to the Statewide Forestry Goal and establishment of a**  
8 **limited use overlay to allow a wastewater treatment facility, lagoon**  
9 **storage of effluent [*sic*] and land application of effluent[.]” Record**  
10 **5 (boldface in original).**

11 The board of commissioners’ final order applying the LU overlay and approving  
12 the CUP includes similar language. Record 7. Neither the ordinance nor the final  
13 order expresses the clear intent necessary to incorporate either the findings in the  
14 staff report or the findings prepared by intervenor into the final decisions.

15 Further, although the record contains only one document labeled “Staff  
16 Report,” and includes as exhibits “Application for CLUP 3-20 and CUP 5-20,”  
17 “Burden of Proof, CLUP 3-20,” and “Burden of Proof, CUP 5-20,” as petitioners  
18 observe, the staff report includes handwritten notes of unknown origin. Record  
19 22. It is therefore not possible for a reasonable person to identify the version of  
20 the staff report that the board of commissioners may have intended to incorporate.

21 The first subassignment of error is sustained.

22 **B. Remaining Subassignments of Error**

23 Because we find that the board of commissioners did not adopt adequate  
24 findings to support the ordinance, we do not reach the remaining subassignments  
25 of error.

26 The second assignment of error is sustained, in part.

1 **SIXTH ASSIGNMENT OF ERROR**

2 Petitioners' sixth assignment of error is that the county's findings are  
3 inadequate to justify a CUP.

4 **A. First Subassignment of Error**

5 Petitioners' first subassignment of error argues that the county failed to  
6 adopt findings demonstrating compliance with the CUP criteria in Klamath  
7 County Land Development Code (KCLDC) Article 55. Petition for Review 35.  
8 The CUP is a permit and must therefore be supported by findings. ORS  
9 215.402(4); ORS 215.416(9).<sup>3</sup> LUBA will reverse or remand a local government  
10 decision where the findings are inadequate. *Sunnyside Neighborhood v.*  
11 *Clackamas Co. Comm.*, 280 Or 3, 569 P2d 1063 (1977).

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<sup>3</sup> ORS 215.402(4) defines a permit as

“discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.”

ORS 215.416(9) provides:

“Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.”

1 Intervenor concedes, “It is true that the final order does not reference a  
2 conditional use permit, but the final order, as discussed previously, adopted  
3 Intervenor’s findings. Intervenor’s findings contain an analysis of the conditional  
4 use permit criteria.” Intervenor’s Response Brief 8. We agree with petitioners  
5 that it is unclear whether the final order approved a CUP. The board of  
6 commissioners’ decision does not refer to approval of a conditional use permit,  
7 and the final order does not clearly incorporate the staff report or intervenor’s  
8 draft findings that consider and apply Article 55.

9 This subassignment of error is sustained.

10 **B. Second Subassignment of Error**

11 Petitioners’ second subassignment of error is an alternative assignment of  
12 error that challenges the substance of the county’s decision to approve the LU  
13 overlay and CUP applications, arguing that, “[t]o the extent that the decision  
14 adequately incorporates by reference findings to approve the conditional use  
15 permit, LUBA should find the decision inadequate to justify approval.” Petition  
16 for Review 36. We sustained the first subassignment of error and concluded that  
17 the findings are inadequate to explain the decision. Accordingly, we need not and  
18 do not resolve this subassignment of error.

19 **C. Third Subassignment of Error**

20 KCLDC Article 57 governs development within the county’s Significant  
21 Resource (SR) overlay. The SR overlay applies, in relevant part, to big game  
22 winter ranges. Klamath County Comprehensive Plan (KCCP) Goal 5, Policy 12.

1 As noted, the subject property is located within Elk Winter Range, and is  
2 therefore subject to the SR overlay. Record 21. Petitioners’ third subassignment  
3 of error is that the county failed to adopt findings demonstrating compliance with  
4 KCLDC Article 57. Petition for Review 38. The board of commissioners’ final  
5 order does not address Article 57. We determined above that the board of  
6 commissioners did not incorporate findings in another document into its decision  
7 and, even if it had, intervenor does not argue that any submittal it provided  
8 addressed Article 57.

9 This subassignment of error is sustained.

10 The sixth assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 OAR 660-004-0020(1) provides:

13 “If a jurisdiction determines there are reasons consistent with OAR  
14 660-004-0022 to use resource lands for uses not allowed by the  
15 applicable Goal or to allow public facilities or services not allowed  
16 by the applicable Goal, *the justification shall be set forth in the*  
17 *comprehensive plan as an exception.* As provided in OAR 660-004-  
18 0000(1), rules in other divisions may also apply.” (Emphasis added.)

19 Petitioners’ third assignment of error is that the county erred by failing to apply  
20 the KCLDC Article 48 requirements for amending the KCCP.

21 KCLDC 48.030 provides:

22 “A. A request for a change of Comprehensive Plan designation  
23 may only be approved if it meets all applicable review  
24 criteria;

1           “B. A request for a change of Comprehensive Plan designation  
2           shall be reviewed against the following criteria:

3           “1. The proposed change is supported by specific studies  
4           or other factual information, which documents the  
5           public need for the change;

6           “2. The proposed change complies with policies of the  
7           Comprehensive Plan and policies and standards of the  
8           Urban Area Transportation System Plan; and

9           “3. The proposed change complies with the Oregon State  
10          wide [*sic*] Planning Goals and Administrative Rules,  
11          including compliance with the TPR (OAR 660-012-  
12          0060). To document compliance with the TPR the  
13          applicant shall submit a Traffic Impact Study pursuant  
14          to Section 71.200. *Exceptions to the Statewide*  
15          *Planning Goals, shall be based upon Statewide*  
16          *Planning Goal 2, Part II (Exceptions) as interpreted by*  
17          *Oregon Administrative Rules (OAR Chapter 660,*  
18          *Division 4).*” (Emphasis added.)

19          Intervenor responds that the KCCP is not amended by the Goal 4 exception. We  
20          disagree. The text of KCLDC 48.030(3) specifically references exceptions and  
21          the applicable review criteria. We agree with petitioners that OAR 660-004-  
22          0020(1) requires that an exception justification “be set forth in the comprehensive  
23          plan.” As such, if the county approves an exception, it must amend the KCCP to  
24          set forth the justification. The board of commissioners erred by failing to consider  
25          the criteria in KCLDC Article 48 that apply to comprehensive plan amendments.

26          The third assignment of error is sustained.

1 **FOURTH ASSIGNMENT OF ERROR**

2 OAR 660-023-0250(3) requires application of Goal 5 in some  
3 circumstances where a post-acknowledgement plan amendment affects a Goal 5  
4 resource. As noted, the subject property is located within Elk Winter Range, a  
5 Goal 5 resource, and is therefore subject to the SR overlay. KCCP Goal 5, Policy  
6 12. The SR overlay implements Statewide Planning Goal 5 (Natural Resources,  
7 Scenic and Historic Areas, and Open Spaces).<sup>4</sup> We agree with petitioners that the  
8 board of commissioners erred in failing to address Goal 5 in its findings. The  
9 board of commissioners did not adopt the staff report or intervenor’s findings and  
10 did not adopt conditions related to protection of Goal 5 resources.<sup>5</sup>

11 The fourth assignment of error is sustained.

12 **FIFTH ASSIGNMENT OF ERROR**

13 Statewide Planning Goal 11 (Public Facilities and Services) is “[t]o plan  
14 and develop a timely, orderly and efficient arrangement of public facilities and  
15 services to serve as a framework for urban and rural development.” OAR 660-  
16 011-0060(3)(b), which implements Goal 11, allows placement of elements of a  
17 sewage system outside of an urban growth boundary if the local government

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<sup>4</sup> Goal 5 is “[t]o protect natural resources and conserve scenic and historic areas and open spaces.”

<sup>5</sup> The board of commissioners’ decision allows new uses that could conflict with a Goal 5 resource, but it does not apply Goal 5 or the implementing administrative rules or address intervenor’s Wildlife Habitat Mitigation Plan. Record 130-34.



1 “[a]dopts land use regulations to ensure the sewer system shall not serve land  
2 outside urban growth boundaries or unincorporated community boundaries” and  
3 “[d]etermines that the system satisfies ORS 215.296(1) or (2) to protect farm and  
4 forest practices.” Petitioners’ fifth assignment of error is that the record lacks  
5 evidence that intervenor has adopted compliant regulations and that the decision  
6 does not impose a condition of approval requiring such compliance. Petition for  
7 Review 35. Intervenor responds that it agreed, in its burden of proof statement,  
8 to adopt regulations in the future to ensure that the sewer system will not serve  
9 rural users. Record 44. However, intervenor provides no explanation of why this  
10 “stipulation” in its application materials is enforceable. Intervenor’s Response  
11 Brief 8. Accordingly, we conclude that that stipulation is insufficient to  
12 demonstrate compliance with OAR 660-011-0060(3)(b) and Goal 11. *See*  
13 *Culligan v. Washington County*, 57 Or LUBA 395, 401 (2008) (“[A]n applicant’s  
14 promise or statement regarding [a] proposed development is not an adequate  
15 substitute for a condition of approval that is necessary to ensure compliance with  
16 applicable approval criteria, even if that promise or statement occurs in the  
17 application narrative.”).

18       The fifth assignment of error is sustained.

19       The county’s decision is remanded.