

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

SCOTT PUTNAM, SHALOE PUTNAM,
JULIA KRAEMER, PATRICK STILWELL,
IRAJ RAFEI, and SHAHEEN BRODIE,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

FRIENDS OF HISTORIC BUTTEVILLE,
Intervenor-Respondent.

LUBA No. 2021-018

FINAL OPINION
AND ORDER

Appeal from Marion County.

William Kabeiseman filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

Scott Norris and Keenan Ordon-Bakalian filed the joint response brief and argued on behalf of respondent and intervenor-respondent. Also on the brief was Jordan Ramis PC.

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

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

1
2
3
4

REMANDED

08/12/2021

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

2 **NATURE OF THE DECISION**

3 Petitioners appeal a board of county commissioners decision approving a
4 floodplain permit and a greenway permit to install a dock and gangway on the
5 Willamette River.

6 **FACTS**

7 In June 2019, the county and intervenor-respondent Friends of Historic
8 Butteville (intervenor) entered into a Memorandum of Understanding (MOU)
9 “relating to the development and maintenance of the right-of-way at the
10 Willamette River landing located in Butteville, Oregon.” Record 1217-18. The
11 MOU provides that the county and intervenor will work together to facilitate
12 improvements intended “to allow the public to access the river and to highlight
13 the significant role that *the Landing* played in Oregon’s history.” *Id.* (emphasis
14 added). The “Landing” includes the portion of the Butte Street right-of-way
15 located between the Willamette River and First Street.¹ The planned
16 improvements include trails, a paddleboat staging area, a paddle dock, and picnic
17 and viewing areas. A concrete trail leading from First Street to the river and

¹ Butte Street was dedicated on a plat recorded in 1871. Between the river and First Street, petitioner Kraemer owns property to the south of Butte Street and petitioners Putnam, Refei, and Brodie own property to the north of Butte Street. Between First Street and Second Street, intervenor’s president owns property to the north of Butte Street. The county’s decision finds that the county’s interest in Butte Street is an easement and that the adjacent property owners own the fee title to the property underlying the Butte Street right-of-way. Record 12.

1 landscaping have been installed and picnic tables have been placed within the
2 Butte Street right-of-way.²

3 On April 2, 2020, subsequent to the installation of the concrete trail and
4 landscaping and the placement of the picnic tables, intervenor and its president
5 applied to the county for a floodplain permit and greenway permit in order to
6 develop a dock and gangway where Butte Street meets the river. Marion County
7 Code (MCC) 17.178.050 provides that development in the floodplain requires a
8 conditional use permit. The planning director approved the conditional use permit
9 application, and petitioners appealed the decision to the hearings officer. The
10 hearings officer held a hearing on June 18, 2020, and, at the conclusion of the
11 hearing, left the record open for new evidence to be submitted by July 2, 2020,
12 rebuttal evidence to be submitted by July 20, 2020, and final written argument to
13 be submitted by July 27, 2020 (together, the Open Record Periods).

14 The hearings officer approved the application, and petitioners appealed the
15 decision to the board of county commissioners. The board of county
16 commissioners held a hearing and voted to approve the application. This appeal
17 followed.

² As far as we are informed, no improvements are proposed or installed in the Butte Street right-of-way between First Street and Second Street.

1 **FIRST ASSIGNMENT OF ERROR**

2 LUBA must reverse or remand a decision if a petitioner demonstrates that
3 the local government “[f]ailed to follow the procedures applicable to the matter
4 before it in a manner that prejudiced the substantial rights of the petitioner.” ORS
5 197.835(9)(a)(B). In their first assignment of error, petitioners argue that the
6 county committed a procedural error that prejudiced their substantial rights when
7 it failed to place materials that petitioners submitted during the Open Record
8 Periods before the hearings officer prior to the issuance of the hearings officer’s
9 decision.

10 In support of this assignment of error, petitioners filed a Motion to Take
11 Evidence Not in the Record that includes as exhibits documents described later
12 in this opinion. The county and intervenor (together, respondents) do not object
13 to the motion. The Motion to Take Evidence is granted.

14 In order to resolve this assignment of error, it is necessary to briefly
15 describe the undisputed factual background. The notice of the June 18, 2020
16 hearing issued by the county on May 28, 2020, directed interested persons to
17 submit written comments to a specific county planning department email address.
18 Record 1131. At the conclusion of the June 18, 2020 hearing, the hearings officer
19 instructed parties to submit written comments during the Open Record Periods
20 “to the planning department.” Audio Recording, Hearings Officer Hearing, June
21 18, 2020, at 2:07:07. No party disputes that the hearings officer’s instructions
22 allowed the submission of items into the record during the Open Record Periods

1 by sending them to the same planning department email address that was listed
2 in the notice of hearing.

3 On July 2, 2020, petitioners' attorney submitted a document that included
4 written argument and exhibits allegedly demonstrating that the applicable criteria
5 were not met. Also on that date, petitioners Putnam submitted written testimony
6 with arguments that the applicable criteria were not met and petitioner Kraemer
7 submitted a document with written testimony and exhibits addressing why they
8 believed the criteria were not met. Those submittals are designated as Exhibits 1,
9 2, and 3 to the Motion to Take Evidence. The county planning department sent
10 emails confirming receipt of the submittals to petitioners. Motion to Take
11 Evidence, Exs 4-6. There is no dispute that the items submitted to the planning
12 department by petitioners' attorney, petitioners Putman, and petitioner Kraemer
13 were not included in the record before the hearings officer prior to the issuance
14 of the hearings officer's decision. Because the items submitted by petitioners
15 were not included in the record before the hearings officer, they were also not
16 included in the record of the hearing transmitted to the board of county
17 commissioners when the hearings officer's decision was appealed.

18 We have held that a local government commits error by refusing to accept
19 relevant evidence that is presented to it during the evidentiary phase of its
20 hearings on a land use application. *See Nez Perce Tribe v. Wallowa County*, 47
21 Or LUBA 419, 424-25, *aff'd*, 196 Or App 787, 106 P3d 699 (2004) (county erred
22 by rejecting relevant evidence without explaining why the evidence was

1 rejected); *Silani v. Klamath County*, 22 Or LUBA 734, 740 (1992) (permit
2 decision must be remanded where local government improperly rejected relevant
3 evidence). We have also held that a local government errs if it receives relevant
4 evidence that is submitted in accordance with local law and then fails to provide
5 that evidence to the local decision maker. *Montgomery v. City of Dunes City*, 60
6 Or LUBA 274, 278, *rev'd on other grounds*, 236 Or App 194, 236 P3d 750
7 (2010). The substantial rights of the parties include the right to a full and fair
8 hearing before the local government. *Muller v. Polk County*, 16 Or LUBA 771,
9 775 (1988). Petitioners argue that the county committed procedural error when it
10 failed to provide their evidence and testimony to the hearings officer and that that
11 failure prejudiced their substantial rights to a full and fair hearing.

12 Respondents respond in two ways. First, respondents point out that the
13 hearings officer's decision listed the items that the planning department received
14 during the Open Record Periods, and petitioners' submittals were not included
15 on that list. Record 178. Although it is not entirely clear, we understand
16 respondents to argue that petitioners should have noticed their submittals'
17 absence from that list and cured that defect by submitting the documents again at
18 or prior to the hearing before the board of county commissioners. Response Brief
19 16.

20 Petitioners point out that they received confirmation from the planning
21 department that the planning department received their submittals, and they argue
22 that they therefore had no reason to believe that their submittals would not be

1 included in the record before the hearings officer. Thus, we understand
2 petitioners to argue, petitioners had no reason to believe that their submittals
3 would not also be forwarded to the board of commissioners when the planning
4 department forwarded the record before the hearings officer to the board of
5 commissioners. Petitioners also argue that the list of documents at Record 178
6 does not purport to be a comprehensive or complete list of all of the documents
7 that the hearings officer considered. In support of that argument, petitioners point
8 to a portion of the decision that states that “the Planning Division file was made
9 part of the Record” without identifying exactly what the planning division file
10 included. Record 177. Petitioners argue that it was reasonable for them to rely on
11 confirmation that the planning department received their submittals to conclude
12 that those documents were part of the record before the hearings officer, either in
13 the “planning division file” or otherwise.

14 We agree with petitioners. The notice of hearing included both the
15 county’s procedure for submitting documents into the record by email and a
16 representation that the planning department would provide documents submitted
17 in that manner to the hearings officer. The notice included a frequently asked
18 questions section, which stated, “We encourage interested citizens to participate
19 in the land use and hearing process. You may send comments in writing (hard
20 copy or electronic mail) prior to the hearing. *Written comments will be included*
21 *in the record.*” Record 1131 (emphasis added). Accordingly, it was reasonable
22 for petitioners to rely on the planning department’s email confirmation that it had

1 received their submittals, at least in the absence of any express statement in that
2 confirmation that the submittals would not automatically be provided to the
3 hearings officer. We also do not think that it was petitioners' obligation to review
4 the hearings officer's decision to confirm that its submittals were included in the
5 record before the hearings officer, identify and investigate any discrepancy, and
6 attempt to cure that county error before the board of commissioners. The hearings
7 officer's decision includes ambiguous language that "the planning division file"
8 was part of the record, and the list at Record 178 does not provide that it is a
9 complete or comprehensive list of submittals received during the Open Record
10 Periods. For those reasons, we disagree with respondents that petitioners were
11 obligated to investigate and discover the county's error and then take steps to
12 remedy that error by submitting their documents to the board of commissioners.

13 Second, respondents respond that petitioners have not established that their
14 substantial rights were prejudiced because, according to respondents, "the
15 documents in question are duplicative of evidence already in the record."
16 Response Brief 15. Respondents cite Record 106 to 122 and 610 to 620 as
17 duplicative of materials included in pages 2 to 18 of Exhibit 1; Record 316 to 322
18 as duplicative of materials included in pages 20 to 27 of Exhibit 1 and pages 34
19 to 41 of Exhibit 2; and Record 621 to 626 as duplicative of pages 2 to 10 of
20 Exhibit 2. We have reviewed the cited record and exhibit pages, and we agree
21 with respondents in part. Record 106 to 122 is identical to the material included
22 in pages 2 to 18 of Exhibit 1. Record 316 to 322 is identical to the material

1 included in pages 20 to 27 of Exhibit 1. The remainder of respondents' record
2 citations do not demonstrate that the material that petitioners submitted to the
3 planning department during the Open Record Periods is duplicative of materials
4 included in the record, and we conclude that it is not. We agree with petitioners
5 that the county's failure to include pages 28 to 55 of Exhibit 1 and Exhibits 2 and
6 3 in the record before the hearings officer and, consequently, the record before
7 the board of commissioners prejudiced petitioners' substantial rights to a full and
8 fair hearing.

9 The first assignment of error is sustained.

10 **REMAINING ASSIGNMENTS OF ERROR**

11 Petitioners' second, third, fourth, fifth, and sixth assignments of error raise
12 substantive challenges to the county's decision, based on allegations of improper
13 construction of various MCC provisions and a lack of substantial evidence in the
14 record to support the decision.

15 **A. Third, Fourth, Fifth, and Sixth Assignments of Error**

16 Because we sustain the first assignment of error, remand is required in
17 order for the decision maker to (1) consider petitioners' submittals that were
18 excluded from the record before the hearings officer and, consequently, the
19 record before the board of county commissioners and (2) reach a decision on the
20 merits of the application after having considered those submittals. Accordingly,
21 it would be premature to address the remaining assignments of error, with the

1 exception of the second assignment of error, which we address in part in order to
2 provide guidance to the county on remand.

3 **B. Second Assignment of Error**

4 MCC 17.119.020 provides:

5 “An application for a conditional use may be filed by the following
6 only:

7 “A. The owner of the property that is the subject of the
8 application;

9 “B. The purchaser of the property that is subject to the application
10 when a duly executed written contract or earnest-money
11 agreement, or copy thereof, is submitted with the application;

12 “C. A lessee in possession of the property subject to the
13 application who submits written consent of the owner to make
14 the application;

15 “D. The appropriate local government or state agency when the
16 application is for a public works project;

17 “E. A governmental body that has initiated condemnation
18 proceedings on the property that is subject to the application,
19 but has not yet gained title; or

20 “F. A co-tenant if the property that is the subject of the
21 application is owned by tenants in common.”

22 MCC 17.119.025 identifies the alternative signatures that are required for an
23 application for a conditional use permit. MCC 17.119.025(A)(1) includes “all
24 owners of the subject property.” MCC 17.119.025(A)(5) includes “an authorized
25 agent of a public agency or utility holding an easement or other right that entitles

1 the applicant to conduct the proposed use on the subject property without the
2 approval of the property owners.”

3 There is no dispute that intervenor does not own the fee title to all of the
4 property underlying the Butte Street right-of-way. The county’s decision finds
5 that the county’s interest in Butte Street is an easement and that the adjacent
6 property owners own the fee title to the property underlying the Butte Street right-
7 of-way. Record 12. As adjacent property owners, some of the petitioners own the
8 fee title to property underlying the Butte Street right-of-way. Record 12. In their
9 second assignment of error, petitioners argue that the county’s findings are
10 inadequate to explain why MCC 17.119.020(A) is met, and they argue that that
11 provision is not met because intervenor and intervenor’s president are neither
12 “owners” of the underlying fee interest in Butte Street nor holders of the easement
13 over Butte Street. Petitioners also argue that the county’s findings do not explain
14 why MCC 17.119.020(D) is met, and they argue that that provision is not met
15 because the application is not an “application * * * for a public works project.”
16 Petitioners argue that the county failed to adopt any findings addressing their
17 argument that MCC 17.119.020 does not authorize intervenor and intervenor’s
18 president to submit the application because neither is an owner of the underlying
19 fee title to Butte Street. Petition for Review 18. Petitioners argue that the county
20 is prohibited as a matter of law from approving the application.

21 The hearings officer’s and board of commissioners’ decisions include
22 findings that, pursuant to MCC 17.119.025(A)(5), the county’s director of public

1 works has the authority to sign the application on behalf of the county, and the
2 decisions condition their approval on the director signing the application.
3 However, the findings do not address petitioners' arguments under MCC
4 17.119.020 at all. Absent any county interpretation of MCC 17.119.020 and of
5 any other relevant MCC provisions, we agree with petitioners that remand is
6 required for the county to adopt findings addressing petitioners' arguments that
7 MCC 17.119.020 does not authorize intervenor and intervenor's president to
8 submit the application and that the application is not for a "public works project."

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

10 The county's decision is remanded.