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

CITY OF ROSEBURG,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

DAN DAWSON, KEVIN MAILLARD, and RHONDA MAILLARD,
Intervenors-Respondents.

LUBA No. 2023-048

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Stephen Mountainspring filed the petition for review and argued on behalf of petitioner. Also on the brief was Dole Coalwell.

Paul E. Meyer filed the respondent's brief and argued on behalf of respondent.

Charles W. Woodward, IV filed an intervenor-respondent's brief and argued on behalf of intervenor-respondent Dan Dawson.

Kevin Maillard and Rhonda Maillard filed an intervenors-respondents' brief. Kevin Maillard argued on behalf of themselves.

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

REMANDED 09/22/2023

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county board of commissioners denying its application for a conditional use permit for a recreational trail on land zoned exclusive farm use.

FACTS

Petitioner applied for a conditional use permit to develop a multi-use recreational trail system on its property zoned Exclusive Farm Use-Grazing (FG). The property is a public park, Sunshine Park, that has been owned and operated by petitioner since 1999.

> "Sunshine Park consists of approximately 93 acres of land * * * located 3.5 miles east of downtown Roseburg, directly north of Highway 138 and Sunshine Rd. About half of the park has been developed with baseball diamonds, a short loop of Class IV paved walking trails, parking areas and a bathroom." Record 721.

The property is located outside the city limits with the developed portion of the property within the urban growth boundary and the undeveloped portion outside the urban growth boundary. Record 256.

Petitioner's application sought to develop the "multi-use recreational trail system, including three miles of improved trails, on the undeveloped 54.34+/- acre portion of Sunshine Park lying outside and adjacent to the city limits of Roseburg." Record 2. The planning commission held hearings on the application and, at the conclusion, approved the application with six conditions. Record 48-54. The planning commission's decision also incorporated by reference the

findings in the January 12, 2023 staff report and the February 9, 2023 supplemental staff report. Record 51.

The planning commission's decision was appealed to the board of commissioners. The board of commissioners conducted an on-the-record review and, at the conclusion, voted to reverse the planning commission's decision and deny the application. The board of commissioners then adopted findings in support of its decision. This appeal followed.

SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR

ORS 197.835(9)(a)(B) provides that the Board shall reverse or remand the land use decision under review if the Board finds that the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]" In order to establish a procedural error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). The substantial rights of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). In its second, third, and fourth assignments of error, petitioner argues that the county committed various procedural errors that prejudiced its substantial rights.

A. Second Assignment of Error

Douglas County Land Use and Development Ordinance (LUDO) 2.120(1)(a) provides that the burden of proof is on the applicant to establish that

a proposed action complies with the applicable criteria of the LUDO. The LUDO does not establish the standard of proof by which an applicant's submittal is measured, and petitioner argues that standard is a "preponderance of the evidence" standard. Petition for Review 11. We do not understand the county and intervenors-respondents to dispute that the standard of proof by which an application is judged is whether an applicant has established by a preponderance of the evidence that the applicable criteria in the LUDO have been met. Accordingly, we agree with petitioner's argument that the standard of proof is a preponderance of the evidence standard.

In its second assignment of error, petitioner argues that the board of county commissioners committed a procedural error that prejudiced its substantial right to a full and fair hearing when it applied a higher standard of proof in deciding that the application failed to satisfy the applicable criteria in the LUDO. Petitioner argues that the county imposed a higher standard than a preponderance of the evidence standard when it found:

> "Upon considering the testimony provided and the evidence and exhibits entered as part of the Planning Commission Record, the Board of Commissioners find[s] that *the submitted application lacks conclusive information* to demonstrate that adverse impacts to the surrounding neighborhood and immediate area will be minimized." Record 7 (emphasis added).

The county and intervenor-respondent Dawson (Dawson) respond that the board of commissioners did not apply a standard of proof greater than the preponderance of the evidence standard and that the quoted finding, and in

particular the use of the phrase "conclusive information," must be read in context with other findings. According to the county and Dawson, those other findings explain that the board of commissioners concluded that petitioner's evidence of compatibility of the use with existing adjacent permitted uses and other uses permitted in the FG zone was not sufficient to overcome other evidence and testimony regarding conflicts with those uses. While it is a close call, we agree with the county and intervenor Dawson that the board of commissioners did not apply a higher standard of proof in evaluating the application or petitioner's evidence. The board of commissioners found that petitioner's evidence did not demonstrate that the applicable criteria of the LUDO were met.

The second assignment of error is denied.

B. Third Assignment of Error

In its third assignment of error, petitioner argues that the board of commissioners committed a procedural error that prejudiced its substantial right to respond to new evidence when it accepted new evidence during the board of commissioners' on-the-record hearing on petitioner's application. According to petitioner, the board of commissioners allowed opponents of the application and one county commissioner, Freeman, to present evidence about conflicts with adjacent farm uses and adjacent residential uses, as well as concerns about fire safety and unhoused persons' use of a public park located in the city. Petition for Review 14-16. Petitioner argues that procedure violated LUDO 2.700(3)(h), which allows only "rebuttal arguments" during an on-the-record hearing.

Dawson responds, initially, that petitioner failed to object to the procedural error during the proceedings before the board of commissioners and may not assign error for the first time at LUBA. LUBA has long held that where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the resulting decision. *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Dobaj v. City of Beaverton*, 1 Or LUBA 237, 241 (1980). This obligation to object to procedural errors overlaps with, but exists independently of, ORS 197.797(1) and 197.835(3). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393 (2002); *Simmons v. Marion County*, 22 Or LUBA 759, 774 n 8 (1992).

Petitioner alleges that "[p]reservation is not required because the error occurred after the record and the time for public participation was closed. The county did not announce that it had considered evidence outside the record until its final written decision." Petition for Review 12. However, with the exception of Commissioner Freeman's statements during deliberations, all of the testimony to which petitioner objects as new evidence was presented before the public hearing before the board of commissioners was closed. Petitioner has not explained why it could not object to the error prior to the close of the public hearing.

Even if the issue was not waived, we also agree with the county and Dawson that the evidence that petitioner alleges is new evidence was presented

before the county during the proceedings before the planning commission and, therefore, is not new evidence. Accordingly, petitioner has not established that the county committed a procedural error.

Finally, in a paragraph at the conclusion of the third assignment of error, petitioner argues that Commissioner Freeman was biased, prejudiced, or prejudged the application. Petition for Review 17. Petitioner has not developed any argument that Commissioner Freeman was biased, prejudiced, or prejudged the application. We will not develop its argument. *Deschutes Development Co. v. Deschutes County.*, 5 Or LUBA 218, 220 (1982).

The third assignment of error is denied.

C. Fourth Assignment of Error

In the fourth assignment of error, petitioner argues that the board of commissioners committed a procedural error in denying the application based on an issue that was not raised in the notice of review filed pursuant to LUDO 2.700(2). LUDO 2.700(2) provides in relevant part that "[r]eview by the Board shall be a de novo review of the record limited to the grounds relied upon in the notice of review[.]"

According to petitioner, during deliberations Commissioner Freeman stated:

> "Yeah, so my issue again is around that seeing all this time to bring this [property] into the city limits you have to deal with all the good bad and the ugly when they occur from this and they [the city] chose not to. And I have yet to hear a reason why. A lot of time. It's been

> 23 years, 24 years. There's a reason why that isn't happening and I'm concerned about that." Petition for Review 19; Audio Recording, Hearing Before the Douglas County Board of Commissioners, May 3, 2023, at 2:47:09.

According to petitioner, Commissioner Freeman's statement demonstrates that the board of commissioners denied the application in part because petitioner has not annexed the subject property into the city limits since it acquired the property, which issue was not identified as a basis for appealing the planning commission's decision.

We have held on numerous occasions that the land use decision reviewed in an appeal before LUBA is the final written decision, not what individual decisionmakers may have stated during the course of the proceedings below. *Gray v. Clatsop County*, 22 Or LUBA 270, 293 (1991); *Gruber v. Lincoln County*, 16 Or LUBA 456, 460 (1988); *Bruck v. Clackamas County*, 15 Or LUBA 540, 542 (1987); *Oatfield Ridge Residents Rights v. Clackamas County*, 14 Or LUBA 766, 768-69 (1986); *Citadel Corporation v. Tillamook County*, 9 Or LUBA 61, 67 (1983). Here, the allegedly improper basis for denying the conditional use permit is not included in the final, written decision. Therefore, petitioner's argument provides no basis for reversal or remand of the county's decision.

The fourth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

The board of commissioners concluded that the application failed to satisfy LUDO 3.39.050(1), which requires an applicant to show that "[t]he proposed use

is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone."[1] (Emphasis added.) The board of commissioners adopted the following two paragraphs of findings to support its decision:

> "1. Upon considering the testimony provided and the evidence and exhibits entered as part of the Planning Commission Record, the Board of Commissioners find[s] that the submitted application lacks conclusive information to demonstrate that adverse impacts to the surrounding neighborhood and immediate area will be minimized.
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> "2. The Board of Commissioners find[s] the Applicant has not adequately demonstrated that the proposed Conditional Use (public park for a multi-use recreational trail system) is, or can be made to be, compatible with the existing permitted residential uses and farm operations on the adjacent and nearby properties, including the large sheep operation on the adjoining property to the east. The Board of Commissioners further find[s] that the intended use of the proposed Conditional Use will have unintended negative consequences on the surrounding and nearby adjacent properties. *Compatibility issues have been identified related to increased fire risks, negative impacts to privacy, increased potential for homelessness on the City's property and significant conflicts to the adjoining large sheep operation.*" Record 7-8 (emphasis added).

ORS 215.416(9) requires that "[a]pproval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement

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[1] The board of commissioners' findings did not address LUDO 3.3.150, which implements ORS 215.296, commonly referred to as the Farm Impacts Test.

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." Before ORS 215.416(9) was first enacted in 1977 (as ORS 215.416(6), renumbered ORS 215.416(9) in 1987), the Supreme Court articulated the now well-established standard for evaluating the adequacy of local findings in *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21 (1977):

> "No particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decisionmaking body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient."

In its first assignment of error, petitioner argues that the board of commissioners' findings are inadequate to satisfy the requirement in ORS 215.416(9) and in *Sunnyside* that the board of commissioners' decision be supported by adequate findings. Petitioner points out that the planning commission evaluated the evidence before it, adopted and incorporated findings in the staff reports, and concluded that, with conditions, the proposed use "may be made compatible with" the adjacent uses and allowed uses in the zone. Petitioner argues that the board of commissioners' findings do not set out any facts that the board relied upon or explain how the facts led to the decision. In particular, petitioner argues that the board of commissioners' findings do not explain why the proposed trail use cannot "be made compatible with existing

adjacent permitted uses and other uses permitted in the underlying zone." Petitioner emphasizes that the planning commission concluded that the use could be made compatible with conditions of approval. The county and Dawson respond that, though brief, the findings are adequate.

Adequate findings set out the applicable approval criteria and explain the facts relied upon to conclude whether the applicable criteria are satisfied. *Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995); *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). LUBA has held that findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with applicable criteria. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994) (quoting *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978)). However, findings of noncompliance must be adequate to explain the local government's conclusion that applicable criteria are not met, and must suffice to inform the applicant of either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Salem-Keizer School Dist. 24-J*, 27 Or LUBA at 371; *Eddings v. Columbia County*, 36 Or LUBA 159, 162 (1999).

As noted, the planning commission adopted detailed findings evaluating the evidence and concluded that the use could be made compatible with the adjacent uses with mitigation measures, and that existing topography and vegetative buffers further minimized adverse impacts to farm and forest uses. The

planning commission also incorporated the findings in two staff reports, many of which addressed issues such as fire risk (Record 590-91), unhoused persons (Record 592), privacy (Record 593) and conflicts with an adjacent sheep farm (Record 595-96).

The board of commissioners' hearing was an on-the-record hearing that included no new evidence. Given those circumstances, we agree with petitioner that the board of commissioners' two paragraphs of findings are inadequate to satisfy the requirement in ORS 215.416(9) that the findings "state[] the facts relied upon in rendering the decision and explain[] the justification for the decision based on the criteria, standards and facts set forth," and the requirement in *Sunnyside* that the findings include "a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based." The board's decision does not explain why the use cannot be made compatible with conditions of approval.[2] The findings merely recite that compatibility issues have been identified, but do not explain why the board of commissioners concluded that the proposed use is not compatible and cannot be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone.

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[2] Petitioner argues that the board of commissioners' findings are inadequate because the findings fail to define the word "compatible" as used in LUDO 3.39.150. However, petitioner does not point to any requirement in the LUDO or elsewhere that in order for findings to be adequate a local government must define undefined but operative terms.

The first assignment of error is sustained.

The county's decision is remanded.