III. FINDINGS

A. STANDARDS

There are "findings" case law that relevant land use testimony cannot be rejected, meaning that the land use hearing bodies must respond to specific issues relevant to compliance with applicable approval standards and criteria that were raised by citizens in the proceedings (i.e., LUBA has held on many occasions that when the public raises legitimate issues in a quasi-judicial land use proceeding concerning a relevant approval criterion, a local government's findings must address such issues).[1] If it does not LUBA may remand back to the local government.

B. LAW

The standards for a Josephine County hearing body's findings of fact and conclusions of law document for the proposed land use request are covered in ORS 215.416(8) & (9), and RLDC 11.030, Findings).

ORS 215.416(8) & (9) provide:

> ORS 215.416(8)(a) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.
> (b) When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.
>
> ORS 215.416(9) 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.

RLDC 11.030 provides, in relevant part:

> "FINDINGS. As required by ORS 215.416(8), written statements of fact, conclusions, and determinations based upon the evidence at hand, presented relative to the criteria and standards for such review and accepted by the review or hearing body in support of a final action."

1. Hugo Neighborhood Association & Historical Society. 2003. *Land Use Decisions: What Are Findings?*. Brochure 1 in Findings Series. Grants Pass, OR.

C. LUBA OPINIONS

Boly v. City of Portland, 40 Or LUBA 537 (2001)

LUBA has explained that where there is focused testimony raising legitimate concerns about compliance with a relevant approval criterion, the local government's findings must address such concerns." See *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408, 429-30 (1999) (citing *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979) and *White v. City of Oregon City*, 20 Or LUBA 470, 477 (1991).

- *Knight v. City of Eugene*, 41, Or LUBA 279 (2002)
- *Boly v. City of Portland*, 40 Or LUBA 537 (2001)
- *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000)
- *Friends of Linn County v. Linn County* _____ (LUBA No. 98-226, December 2, 1999)
- *Wood v. Crook County*, 36 Or LUBA 143 (1999)
- *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998)
- *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613 (1997)
- *Harcourt v. Marion County*, LUBA No. 97-028 (1997)
- *Thomas v. Wasco County*, 30 Or LUBA 302 (1996)
- *Le Roux v. Malheur County*, 30 Or LUBA 268 (1995)
- *Suydam v.Deschutes County*, 29 Or LUBA 273, aff's 136 Or App 548 (1995)
- *Eppich v. Clackamas County*, 26 Or LUBA 498, 507-08 n4 (1994)
- *Furler v. Curry County*, 27 Or LUBA 497, 500-01 (1994)
- *Gage v. City of Portland*, 123 Or App 269, ___ P2d ___, adhered to 125 Or App 119 (1993)
- *Eskandarian v. City of Portland*, LUBA No. 93-012, October 15, 1993
- *Angel v. City of Portland*, 22 Or LUBA 649, 656-57, aff'd 113 Or App 169, 831 P2d 77 (1992)
- *Silani v. Klamath County*, 22 Or LUBA 734, 739 (1992)
- *Heiller v. Josephine County*, 23 Or LUBA 551 (1992)
- *Blosser v. Yamhill*, 18 Or LUNA 253, 264 (1989)
- *McCoy v. Linn County*, 16 Or LUBA 295 (1987), aff'd 90 Or App 271, 752 P2d 323 (1988)
- *Ash Creek Neighborhood Ass'n v. City of Portland*, 12 Or LUBA 230, 236-38 (1984)
- *Hillcrest Vineyard v. Bd. Of Comm. Douglas Co.*, 45 Or App 285 (1980)
- *City of Wood Village v. Portland Metro. Area LGBC*, 48 Or App 79 (1980)
- *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979)
- *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977)

LUBA's opinion in *Friends of Linn County v. Linn County*, in relevant part, provides:

"FIRST ASSIGNMENT OF ERROR"

"Petitioner argues the county erred by refusing to accept or consider relevant evidence that opponents offered at the October 28, 1998 board of commissioners hearing in this matter."

"At the October 28, 1998 board of commissioners, opponents of the application offered a partial transcript of the planning commission's July 14, 1998 hearing in this matter. That partial transcript included testimony by intervenor concerning current and past uses of the parcel and the practicability of farming the parcel. It is undisputed that this is relevant testimony.[1]"

" The board of commissioners determined that, because it was conducting a *de novo* review, it would not accept the partial transcript. At one point, the board of commissioners apparently considered accepting the transcribed testimony from the planning commission hearing, provided the entire planning commission hearing was transcribed. Record 14; Petition for Review, Appendix C 15. However, at the conclusion of the October 28, 1998 hearing, in considering whether opponents wished to request a continuance to submit a complete transcript of the planning commission hearing, two of the three members of the board of commissioners made it clear that such a transcript would not be considered or accepted if it was submitted. Petition for Review, Appendix C 19. When the opponents were asked again if they wished to request a continuance. They responded: "Not if a transcript will not be accepted. There's no point." *Id*."

"The only local rule concerning submittal of evidence that is cited by any party to this appeal is Linn County Land Development Code (LCDC) 921.135(I)(5).[2] There is nothing in that code section that authorizes the board of commissioners to refuse to accept or consider relevant written testimony. To the contrary, LCDC 921.135(I)(5)(h) specifically provides that written testimony may be presented, provided copies are made available to other parties. As we explained in *Silani v. Klamath County*, 22 Or LUBA 734, 739 (1992), a local government may not refuse to accept or consider evidence that is relevant to an approval criterion."

"Nothing about the fact that the board of commissioners' hearing is de novo allows it to refuse to accept or consider relevant written evidence, simply because it is in the form of a transcript of a prior planning commission hearing. A de novo review simply means that the board of commissioners is in no way bound by the planning commission's decision and the board of commissioners makes its decision as though the planning commission decision had not been made.[3] Apparently the board of commissioners creates its own evidentiary record on appeal and is not limited to the evidentiary record before the planning commission in its *de novo* review. "However, the fact that the board of commissioners creates its own evidentiary record does not mean it can refuse to accept relevant evidence, simply because that evidence may have been submitted to the planning commission or was generated during the planning commission proceedings. *Furler v. Curry County*, 27 Or LUBA 497, 500-01 (1994). Even if the board of commissioners could require that a complete rather than a partial transcript of the planning commission hearing be provided, to ensure that the testimony is not taken out of context, that option was not given to the opponents of the application in this case."

"Intervenor faults the opponents for not offering a complete transcript on October 28, 1998 and for failing to request a continuance to prepare and submit a complete transcript. The short answer to the first contention is that LCLDC does not require a complete transcript, or at least no party cites a provision that imposes that requirement. The short answer to the latter contention is that the opponents were not required to request a continuance when the board of commissioners made it quite clear that the complete transcript would not be accepted or considered."

"The first assignment of error is sustained."

Footnote "1. LUBA may remand a decision for a procedural error, only where that procedural error prejudices petitioner's substantial rights. ORS 197.835(9)(a)(B). We understand petitioner to content that its substantial rights were prejudiced by the board of commissioners' failure to accept the transcript before the planning commission, because that is the only way petitioner could produce that testimony."

Footnote "2. LCLDC 921.135(I)(5) provides: . . ." information on the public hearing procedure.

Footnote "3. Black's Law Dictionary defines "de novo" as: "Anew; afresh; a second time. * * *" Black's Law Dictionary 483 (4th edf 1968)."

LUBA in *Furler v. Curry County*, 27 Or LUBA 497, 500-01 (1994), in relevant part, provides:

"Intervenors submitted their forest dwelling application to the county planning department on September 25, 1992. Record 41. The application was initially reviewed by the county planning commission.[1] The board of county commissioners conducted a de novo review of the application and, after a public hearing, issued an order approving the application on March 21, 1994. This appeal followed."

"FOURTH ASSIGNMENT OF ERROR"

"A. Rejection of Planning Commission Documents"

"At the February 15, 1994 public hearing before the board of commissioners, petitioner sought to introduce into the record the planning department staff report to the planning commission on the subject application (staff report) and the planning commission's final order on the subject application (planning commission order). The motions to accept these documents failed, and the documents were rejected. Record 22-23. According to the minutes of the hearing, after the board of commissioners' votes to reject the planning commission order and staff report, county counsel explained the board of commissioners' actions to petitioner as follows:"

> "[T]he Board [of commissioners] rejected the Final order because it related to the decision of the Planning Commission. [W]hatever the Planning Commission did before was irrelevant to this hearing, and it's as if the hearing before the Board [of Commissioners] was the first hearing. [I]f there was anything in particular in the Final Order [petitioner] wanted in the record, he could submit it in a different way."
>
> "* * * * *

"[I]f there were anything substantive that related to the exhibits rejected, [counsel] would invite [petitioner] to submit them. [I]t could be excerpts or things like that, just northing that related to the [planning commission] decision itself." (Emphases added.) Record 23."

"Petitioner contends both the staff report and planning commission order contained evidence or argument relevant to the board of commissioners' decision on the subject application. We understand petitioner to argue his substantial right to introduce evidence was prejudiced by the board of commissioners' refusal to accept these documents."

"It appears from the record that in conducting a de novo review of the subject application, the board of commissioners intended to consider the application anew, as if no decision had previously been rendered by the planning commission. See Strawn v. City of Albany, 20 Or LUBA 344, 351 n 8 (1990) (discussion of different types of "de novo" proceedings). No party challenges the board of commissioners' authority to conduct such a de novo review. Petitioner does contend, however, that the staff report and planning

commission decision contain evidence and argument relevant to the subject application and that the board of commissioners erred by refusing to accept these documents into the record.[3] We agree with petitioner."

"Petitioner has a substantial right to submit evidence in a quasi-judicial land use proceeding. Fasano v. Washington Co. Comm., 264 Or 574, 588, 507, P2d (1973); Muller v. Polk County, 16 Or LUBA 771, 775 (1988). This right was prejudiced by the board of commissioners' refusal to accept the disputed documents. The county counsel's invitation to petitioner to submit certain excerpts from these documents into the record "in a different way" does not eliminate this prejudice to petitioner's substantial right. Based on the record before us, petitioner could not determine what portions of the disputed documents might be considered acceptable or in what "different way" than submitting the document itself petitioner should submitted such portions of the documents."

"This subassignment of error is sustained.[4]"

"Footnote "1. No documents pertaining to the planning commission's review are found in the record submitted to the county. The board of commissioners' decision to reject the planning department's staff report to the planning commission and the planning commission's decision is challenged by the petitioner under the fourth assignment of error, infra."

Footnote "3. We do not understand petitioner to contend these documents must be given any special weight as evidence or argument. Rather, petitioner argues simply that they are relevant."

LUBA in *Silani v. Klamath County*, 22 Or LUBA 734, 739 (1992), in relevant part, provides:

"Intervenors-respondent (intervenors) applied for a conditional use permit for a restaurant.[1] The planning director approved the application and petitioners appealed to the county hearings officer, who affirmed the decision of the planning director. After a public hearing, the board of commissioners affirmed the decision of the planning director and this appeal followed."

"EIGHTH ASSIGNMENT OF ERROR"

"The county failed to follow the correct procedure when it refused to accept substantial evidence during the de novo appeal hearing that was held regarding CUP 34-91."

". . . However, whether the subject application for a conditional use permit is for a use substantially identical to a use proposed by a conditional use permit application denied within the previous year, is relevant to determining the proposal's compliance with LDC 44.040(F). Consequently, the county erred by refusing to accept petitioners' evidence on this issue."

In summary, LUBA in *Silani v. Klamath County* explained that a local government may not refuse to accept or consider evidence that is relevant to an approval criterion.

D. ANOMALIES

The local government is required to make adequate findings addressing all issues raised by evidence and testimony introduced into the record. It would be difficult or impossible to make adequate findings without "reviewing and considering" all the evidence and testimony. However, as we all know, the "substantial evidence" standard allows for the upholding of a local government decision if there is even one piece of supporting evidence in the record that a reasonable person could rely on, regardless of the quantity or quality of contradicting evidence and testimony.

There are several major anomalies which relate to the findings principle that land use hearing bodies must respond to specific issues relevant to compliance with applicable approval standards and criteria that were raised by citizens during land use proceedings.

1. Testimony Submitted Prior to a Local Hearing

You can never be certain that testimony submitted before a hearing takes place is actually entered into the record. The requirement is that the testimony be "placed before the decision makers and not be rejected." So to be safe, at the hearing the testifier must specifically ask if material previously submitted had been entered into the record, and always have a copy ready to submit if the answer should be unsatisfactory.

2. Testimony Submitted At A Local Hearing

During the proceedings the hearing body does not legally have to read or consider relevant testimony submitted into the record. Unfortunately there is no error in not reviewing and considering testimony or evidence that is "placed before the decision makers and not rejected." The hearing body is free to do with it as they want. The error comes later in the signed findings, and only for the final decision-maker (i.e., LUBA has held on many occasions that when the public raises legitimate issues in a quasi-judicial land use proceeding concerning a relevant approval criterion, a local government's findings must address such issues). If it does not LUBA may remand back to the local government.

The local hearing bodies do not have to accept testimony submitted into the record during a public hearing that they do not considered relevant. In this case the job of the testifier is to preserve the issue through the "raise it or waive it process". For example, the testifier should make a "point of order" why the testimony should be accepted into the record and/or make sure the objection to the rejection of testimony is in the minutes of the hearing.

- *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).
- *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

3. Testimony Submitted At A Local RPC Hearing

The LUBA standard that a local government's findings must address legitimate issues the public raises in a quasi-judicial land use proceeding concerning a relevant approval criterion does not apply to the RPC for comprehensive plan amendments dealing with a change from resource land. For example, in the comprehensive plan change scenario the RPC is not the decision maker and does not prepare written findings.

. A final decision of the RPC shall be in the form of findings of fact meeting the requirements of state law and RLDC 31.130.C. *Decisions which constitute a recommendation* to the BCC shall be in the form of minutes detailing the testimony, arguments and deliberations leading up to the recommendation. RLCD 24.050.F.

. Applications involving exceptions or agricultural or forest lands shall be reviewed by the RPC in a public hearing. At the conclusion of the hearing the RPC shall deliberate and make a recommend-ed decision to the BCC. RLDC 46.020.

In other words, ORS 197.615(1) requires that the governing body make the final decision on a post-acknowledgment plan amendment. Therefore, there are not any findings to review prior to those made in support of the local governing body's decision. Of course, a local government may incorporate a planning commission's recommendations into its final decision, if it so desires.

- *Allen v. Grant County*, 39 Or LUBA 232 (2000).
- *Hood River Valley Res. Comm. v. City of Hood River*, 33 Or LUBA 233 (1997).