

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 RONALD D. MURRAY,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CLACKAMAS COUNTY,)
11)
12 Respondent.)
13
14

LUBA No. 91-081

FINAL OPINION
AND ORDER

15 Appeal from Clackamas County.
16

17 Ronald D. Murray, Portland, filed the petition for
18 review and argued on his own behalf. With him on the brief
19 was Wellman & Murray, P.C.
20

21 Gloria Gardiner, Oregon City, filed the response brief
22 and argued on behalf of respondent.
23

24 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
25 Referee, participated in the decision.
26

27 REMANDED 10/29/91
28

29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the county hearings
4 officer approving a conditional use permit for a residential
5 care facility for the elderly.

6 **FACTS**

7 The subject property is 3/4 of an acre in size and is
8 zoned Medium Density Residential (MR-1).

9 The applicant applied for a conditional use permit for
10 a residential care facility for 45 elderly residents. The
11 proposed facility will consist of three separate structures,
12 each of which will house 15 people. The proposed facility
13 is to be located on Linden Lane, a narrow dead end street.
14 There are no sidewalks on Linden Lane. Courtney Street, an
15 arterial street, intersects the southern end of Linden Lane.

16 The hearings officer approved the applicant's request
17 and this appeal followed.

18 **MOTION FOR LEAVE TO FILE REPLY BRIEF**

19 Petitioner seeks leave to file a reply brief.
20 Respondent objects.

21 OAR 661-10-039 provides that the Board may grant
22 permission to file a reply brief if the reply is limited to
23 new matters contained in the respondent's brief. In its
24 response brief, the county argues that certain Clackamas
25 County Zoning and Development Ordinance (ZDO) provisions,
26 which are the subjects of the first through third

1 assignments of error, do not apply to the challenged
2 decision. The reply brief includes arguments why those code
3 sections apply to the challenged decision.

4 The reply brief is allowed. The Board will limit its
5 consideration of the reply brief to petitioner's reply to
6 the county's responses to the first through third
7 assignments of error.

8 **FOURTH ASSIGNMENT OF ERROR**

9 "The hearings officer and respondent erred in that
10 their findings of fact under [ZDO] 1203.01C that
11 the site and proposed development is timely,
12 considering adequacy of transportation systems[,]
13 are not supported by substantial evidence [i]n the
14 record and the evidence relied on is misplaced."

15 ZDO 1203.01(C) requires the county to determine the
16 following to approve a conditional use permit:

17 "The site and proposed development is timely,
18 considering the adequacy of transportation
19 systems, public facilities and services existing
20 or planned for the area affected by the use."

21 Under this assignment of error, petitioner argues
22 certain findings are inadequate and that the decision lacks
23 evidentiary support. We address these challenges separately
24 below.

25 **A. Inadequate Findings**

26 The challenged findings state:

27 "* * * The Hearings Officer concludes that [Linden
28 Lane] is adequate for the proposed use. The
29 residents of this facility will not have their own
30 vehicles. The only traffic generated by the
31 proposed use will be by visitors, staff and
32 service vehicles. This traffic should be less

1 than that which is anticipated if the property
2 were otherwise [developed] with medium density
3 dwellings. * * *." Record 3.

4 Petitioner contends these findings are conclusory.
5 Petitioner argues "there is no determination as to the
6 number of visitors the residents would have on a daily basis
7 * * *." Petition for Review 16. Petitioner maintains the
8 findings fail to identify the number of visitors anticipated
9 per day for each resident, and how the county arrived at the
10 conclusion that the traffic impacts from the proposed
11 facility will be less than those which would be expected
12 from other medium density dwellings. Petitioner also argues
13 the findings should have addressed the anticipated number of
14 emergency and other service vehicles which would be required
15 to service the facility.

16 We agree with petitioner that the challenged findings
17 are conclusory and inadequate. The only reason stated for
18 concluding Linden Lane has adequate capacity to serve the
19 proposed use is that the proposed use will generate less
20 traffic than would medium density residential uses allowed
21 by the MR-1 zoning district. However, we cannot ascertain
22 the basis upon which the county determined the proposed
23 facility would generate fewer traffic trips than other
24 medium density residential uses allowed in the MR-1 zone.
25 It is not apparent why a 45 bed residential care facility
26 will produce less traffic than would other medium density
27 residential uses allowed in the MR-1 zoning district.

1 This subassignment of error is sustained.¹

2 **B. Evidentiary Support**

3 Petitioner argues the findings of compliance with
4 ZDO 1203.01(C) are not supported by substantial evidence in
5 the whole record. Petitioner specifically challenges the
6 evidentiary support for the following findings:

7 " * * * The residents of this facility will be
8 elderly, but generally ambulatory. This property
9 is located near shopping public transportation and
10 commercial support services. The limitation of
11 this site is that Linden Lane is without sidewalks
12 to Courtney Avenue, where public transportation is
13 available. Neighbors have offered substantial
14 testimony that Linden Lane is heavily travelled,
15 and unsafe for walking by the potential residents
16 of this facility. The Hearings Officer
17 acknowledges this limitation, but concludes that

¹Petitioner also argues the findings improperly rely upon a recommendation of the county department of transportation which is based on an erroneous assumption. Specifically, petitioner argues, and there is no dispute, that the county transportation department's recommendation of approval of the proposal erroneously assumes a 45 unit apartment building on the subject site is an allowed use in the MR-1 zoning district. The recommendation of the department of transportation provides:

"Recommendation: Approval. No more traffic impacts anticipated from the proposal. This development is expected to generate about 90 daily trips. A 45 unit apartment complex would generate about 270 trips." Record 94.

There is no dispute that the maximum number of multifamily units permitted on MR-1 zoned property which has the characteristics of the subject parcel, is 10 units. Petitioner argues the transportation department's erroneous assumption that a 45 unit "apartment complex" is a permitted use in the MR-1 zone so undermines its recommendation of approval for the proposal that the recommendation has no evidentiary value. We believe it is erroneous to rely on the transportation department's report to determine the transportation systems in the area are adequate, when that document is based on an admittedly irrelevant comparison of the traffic impacts of the proposed facility to those of a "45 unit apartment complex." Record 94.

1 the other suitable characteristics override this
2 limitation.

3 * * * * *

4 * * * As to the adequacy of the transportation
5 system, the County's Principal Transportation
6 Planner has reviewed this application and
7 recommends approval. Although there has been
8 substantial testimony from area residents about
9 the shortcomings of Linden Lane, the Hearings
10 Officer concludes that this road is adequate for
11 the proposed use. * * *"² Record 3.

12 Essentially, petitioner contends the evidence in the
13 record is insufficient to support a determination that there
14 is adequate pedestrian access from the proposed facility to
15 public transportation along Linden Lane.

16 Petitioner contends the record does not support a
17 finding that there is public transportation available on
18 Courtney Avenue at any location at or near Linden Lane, as
19 is suggested by the findings. In addition, petitioner
20 requests that we take official notice of a copy of a Tri-
21 County Metropolitan Area Transportation District (Tri-Met)
22 map entitled "Transit Map," and an affidavit of Richard L.
23 Gearhart, Tri-Met's Director of Operations Planning and
24 Scheduling, as support for the proposition that there is no
25 public transportation available on Courtney Road at or near
26 Linden Lane. Petitioner argues we should take official

²Petitioner also challenges the evidentiary support for the county findings regarding the traffic generated by the proposed facility. However, we explain above that those findings are inadequate. No purpose is served in reviewing the evidentiary support for inadequate findings.

1 notice of these two documents on the basis that they contain
2 "adjudicative facts."

3 Petitioner also states, and there is no dispute, that
4 Linden Lane is an extremely narrow, heavily travelled
5 street, without sidewalks, and is unsafe for pedestrians.
6 Petitioner cites evidence of the many overwide vehicles
7 which service two similar care facilities in the
8 neighborhood. Petitioner argues the vehicle traffic serving
9 the proposed facility will be similar to that which services
10 the other care facilities in the neighborhood, in the sense
11 that there will be delivery vans and ambulances traveling up
12 and down Linden Lane to reach the proposed facility.
13 Petitioner states Linden Lane lacks any safe place for such
14 vehicles to turn around at or near the proposed facility,
15 and that Linden Lane cannot safely accommodate additional
16 overwide emergency and service vehicles. Petitioner argues
17 the additional traffic generated by the proposed facility
18 will make travel along Linden Lane even more dangerous, and
19 underscores the limited capacity of Linden Lane.

20 The county responds simply by asserting the challenged
21 decision is supported by substantial evidence in the record,
22 and by providing a citation to 28 pages in the record.
23 Those documents cited by the county include information that
24 (1) Linden Lane is dangerous for walking, (2) the residents
25 of the proposed facility will be frail, with most having
26 canes or walkers to assist in ambulation, and (3) these

1 residents will "rarely" be interested in riding a bus. This
2 evidence is not sufficient to support a conclusion that
3 there is adequate access to public transportation from the
4 proposed site or that the residents of the proposed facility
5 will not require access to public transportation.

6 Concerning petitioner's request that we take official
7 notice of the copy of the Tri-Met map and affidavit on the
8 basis that they contain "adjudicative facts," we have
9 previously determined that we lack authority to take
10 official notice of adjudicative facts. Blatt v. City of
11 Portland, ___ Or LUBA ___ (LUBA No. 90-152, June 28, 1991),
12 slip op 7-8, aff'd ___ Or App ___ (1991). Consequently, we
13 will not do so here.

14 Concerning the location of public transportation, the
15 only evidence in the record to which we are cited is the
16 applicant's statement that "all private support services are
17 located on McLaughlin Blvd., a very short distance away,
18 along with public transportation" (Record 112); and a
19 statement in the staff report that "the subject property is
20 located a short distance from Courtney Avenue (Courtney) and
21 McLaughlin Boulevard (McLaughlin), where bus transportation
22 is available." Record 98. Fairly read, this evidence
23 supports a determination that there is public transportation
24 at the intersection of Courtney and McLaughlin, not Courtney
25 and Linden Lane. Further, as noted above, the findings
26 assume the residents of the proposed facility will require

1 the use of public transportation, and that some of the
2 residents will walk to such public transportation. In
3 addition, there is no dispute that the residents of the
4 proposed facility will have to walk down Linden Lane to
5 reach the public transportation system, that it is dangerous
6 to walk on Linden Lane, and that many of the residents will
7 be able to walk only with the assistance of canes or
8 walkers.

9 We have reviewed all of the evidence in the record to
10 which we are cited. We believe the record does not contain
11 substantial evidence to support a determination that the
12 residents of the proposed facility will be able to safely
13 access the public transportation available at McLaughlin and
14 Courtney. We conclude there is not substantial evidence in
15 the whole record to conclude that transportation systems are
16 adequate to serve the proposed facility.

17 This subassignment of error is sustained.

18 The fourth assignment of error is sustained.

19 **FIFTH ASSIGNMENT OF ERROR**

20 "The hearings officer and respondent erred in
21 holding that pursuant to [ZDO] 1203.01B, the
22 characteristics of the site are suitable for the
23 proposed use in considering the element of
24 location and under [ZDO] 1203.01D that the
25 proposed use will not alter the character of the
26 surrounding area in a manner which substantially
27 limits, impairs or precludes the use of the
28 surrounding properties for the primary uses listed
29 in the underlying district."

30 ZDO 1203.01(B) and (D) require the county to determine

1 the following to approve a conditional use permit:

2 "(B) The characteristics of the site are suitable
3 for the proposed use considering size, shape,
4 location, topography, existence of
5 improvements and natural features.

6 "* * * * *

7 "(D) The proposed use will not alter the character
8 of the surrounding area in a manner which
9 substantially limits, impairs or precludes
10 the use of the surrounding properties for the
11 primary uses listed in the underlying
12 district."

13 Under this assignment of error, petitioner essentially
14 repeats his arguments under the fourth assignment of error
15 that the challenged decision is not supported by substantial
16 evidence with regard to transportation improvements and
17 impacts.

18 The county asserts the challenged decision is supported
19 by substantial evidence and cites 34 pages of the record.
20 The county apparently concedes that traffic impacts of the
21 proposed use are relevant to a determination of compliance
22 with ZDO 1203.01(B) and (D). As far as we can tell, traffic
23 impact considerations associated with the proposal are
24 relevant to determining the existence of road improvements
25 suitable to serve the proposal under ZDO 1203.01(B) and to
26 whether the proposal will alter the character of the
27 surrounding area as specified under ZDO 1203.01(D).
28 Accordingly, for the reasons stated under the fourth
29 assignment of error, we conclude the findings of compliance
30 with ZDO 1203.01(B) and (D) are not supported by substantial

1 evidence in the whole record.³

2 The fifth assignment of error is sustained.

3 **FIRST ASSIGNMENT OF ERROR**

4 "Hearings officer and respondent erred as a matter
5 of law in * * * holding that [ZDO] 812.01C, has no
6 application in the present conditional use
7 proceedings (RR-05)."

8 **SECOND ASSIGNMENT OF ERROR**

9 "Hearings officer and respondent erred in granting
10 approval of conditional use when the application
11 [sic] failed to submit into the record a vicinity
12 map locating the site in relation to transit
13 service, other compatible land uses and any other
14 residential care facilities within 1,000 feet.
15 The error was material and resulted in a decision
16 by the hearings officer not supported by the
17 record and the failure to make adequate findings
18 of fact and conclusions of law based on
19 substantial evidence."

20 ZDO 812.01(C) establishes the following submittal
21 requirements for applications for residential care
22 facilities:

23 "A vicinity map locating the site in relation to
24 transit service, other compatible land uses, and
25 any other residential care facility within one
26 thousand (1000) feet of the site."

27 Petitioner argues the applicant failed to submit a
28 vicinity map showing the location of the site in relation to
29 public transportation, as well as the location of other

³We also determine under the fourth assignment of error that certain of the findings are inadequate. To the extent the county also relies on those findings to establish compliance with ZDO 1203.01(B) and (D), they are inadequate to establish compliance with those standards as well.

1 similar facilities within 1000 feet of the proposed site.

2 The county argues the applicant is not required to
3 submit a vicinity map under ZDO 812.01(C), pursuant to the
4 requirements of ZDO 812.01(B), which provides:

5 "Residential care facilities in urban low density
6 or rural districts shall be located no closer
7 together than 1,000 feet, unless topography or
8 other natural or manmade features separate the
9 neighborhoods, or unique circumstances related to
10 the proposed location are demonstrated. This
11 restriction shall not apply to the siting of
12 residential care facilities in multi-family
13 districts * * *."

14 The county argues, alternatively, that if ZDO 812.01(C) does
15 apply, failure to submit a vicinity map should not result in
16 reversal or remand of the challenged decision. The county
17 argues the failure to submit a vicinity map is an error of
18 procedure for which petitioner has not established any
19 prejudice to his substantial rights. ORS 197.835(7)(a)(B).

20 We agree with the county that in view of ZDO 812.01(B),
21 it is unnecessary for an applicant to submit a map showing
22 the location of other residential care facilities within
23 1,000 feet of the proposed site. However, we disagree with
24 the county that ZDO 812.01(B) has any bearing on the
25 requirement of ZDO 812.01(C) for provision of a vicinity map
26 showing public transportation in relation to the proposed
27 site. Nevertheless, there is information concerning the
28 location of public transportation elsewhere in the record.
29 Consequently, we agree with the county that the failure to
30 include the vicinity map showing public transportation, is

1 an error of procedure which did not prejudice petitioner's
2 substantial rights.⁴ McConnell v. City of West Linn, 17 Or
3 LUBA 502, 525 (1989). Accordingly, that the record does not
4 include a vicinity map provides no basis for reversal or
5 remand of the challenged decision.

6 The first and second assignments of error are denied.

7 **THIRD ASSIGNMENT OF ERROR**

8 "The hearings officer and the respondent erred in
9 granting the conditional use for the subject
10 property at such time as the conditional standard
11 under [ZDO] 812.02 was not met."

12 ZDO 812.02 provides "conditional standards" applicable
13 to residential care facilities. ZDO 812.02(E) provides:

14 "All residential care facilities shall meet the
15 following minimum requirements:

16 "* * * * *

17 "E. The structure, and any remodeling or major
18 alteration thereof, shall be approved by the
19 appropriate division of Environmental
20 Services for the proposed use."

21 The challenged decision does not reflect that the
22 environmental services approval referred to in ZDO 812.02(E)
23 has been obtained, and does not contain a condition of
24 approval requiring such environmental services approval
25 prior to the issuance of the conditional use permit.

⁴The applicant's failure to submit a site map showing the location of public transportation as it relates to the proposed site hurts the applicant in the sense that, in its absence, the decision may lack substantial evidence on the existence or availability of public transportation.

1 Petitioner argues that under ZDO 812.02(E) and ZDO 302.05⁵
2 environmental review must occur before a conditional use
3 permit may be approved.

4 The county explains the requirement of ZDO 812.02(E)
5 for environmental services approval simply means the
6 applicant must obtain a building permit. The county states
7 it was not necessary to include a condition of approval
8 requiring petitioner to obtain a building permit because a
9 building permit must be obtained, as a matter of law, before
10 any new construction may begin.

11 Petitioner does not offer any other explanation of what
12 is associated with an environmental services approval under
13 ZDO 812.02(E) other than obtaining a building permit, and we
14 see nothing in the ZDO defining an environmental services
15 review. Further, another requirement in ZDO 812.02 does not
16 appear to have been intended as a condition precedent for
17 approval of a conditional use permit. That requirement is
18 contained in ZDO 812.02(A), and requires a residential care
19 facility to "maintain" applicable licenses. Accordingly, we
20 agree with the county that ZDO 812.02(E) simply requires the

⁵ZDO 302.05 provides:

"Conditional uses may be established in a Medium Density Residential district subject to review and action on the specific proposal, pursuant to Section 1300, or the review procedures provided under the specific 800 section. * * * Approval shall not be granted unless the proposal satisfies the criteria set forth in Section 1203 and the special use requirements under Section 800."

1 applicant to obtain a building permit, and obtaining a
2 building permit need not be a condition of approval, because
3 a building permit is required to construct the proposal with
4 or without a condition of approval to that effect.

5 The third assignment of error is denied.

6 **SIXTH ASSIGNMENT OF ERROR**

7 "The hearings officer and respondent erred in
8 holding that the applicant has provided non-
9 contested information that there is a significant
10 need within the general area for this type of
11 elderly housing."

12 The county adopted findings stating there is a "need"
13 for the proposed development, which petitioner challenges.
14 However, that findings are inadequate or are not supported
15 by substantial evidence, provides a basis for reversal or
16 remand of appealed decisions only if the findings are
17 essential to the challenged decision. Moorefield v. City of
18 Corvallis, 18 Or LUBA 95, 101 (1989); Cann v. City of
19 Portland, 14 Or LUBA 254, 257, aff'd 80 Or App 246 (1986);
20 Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984). Here,
21 no approval standards in the ZDO require the county to
22 determine the existence of a "need" for a residential care
23 facility before one may be approved as a conditional use in
24 the MR-1 zone. Accordingly, the county's findings regarding
25 a need for the proposed facility are surplusage.

26 The sixth assignment of error is denied.

27 The county's decision is remanded.