

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the Clackamas County
4 Hearings Officer granting design review approval for a
5 wastewood recycling facility.

6 **FACTS**

7 The subject property is zoned Rural Industrial (RI).
8 It is located on Highway 224, in the vicinity of the
9 unincorporated community of Carver. Petitioner operates a
10 business of collecting, storing and processing wood
11 materials (primarily trunks, limbs and other tree remnants)
12 on the subject property. The sources of the wood materials
13 are diverse, including yard work, landscaping, logging and
14 land clearing. Petitioner processes such wood materials for
15 the ultimate production of "hog fuel," a fuel resource.

16 In 1989, the county filed suit against petitioner in
17 circuit court, claiming violations of the Clackamas County
18 Zoning and Development Ordinance (ZDO) and other ordinances.
19 On February 22, 1990, the circuit court entered a judgment
20 allowing petitioner to continue its use of the subject
21 property, but requiring petitioner to apply to the county
22 for design review approval and to comply with any conditions
23 lawfully imposed by the county through the design review
24 process.

25 On February 22, 1991, the Design Review Committee (DRC)
26 approved petitioner's revised site plan, subject to 15

1 conditions.¹ Petitioner appealed the DRC decision, with
2 regard to 11 of the conditions, to the hearings officer. On
3 June 12, 1991, after a public hearing, the hearings officer
4 issued a decision upholding the DRC decision, with the
5 deletion of two of the appealed conditions and modification
6 of a third. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 "[The county] is preempted by ORS 527.722 from
9 imposing the provisions of land use regulations
10 promulgated under ORS chapter 197 on petitioner's
11 forest practices use of petitioner's operational
12 site."

13 ORS 527.722(1) provides in relevant part:

14 "Notwithstanding any provisions of ORS chapters
15 196, 197, 215 and 227, * * * no unit of local
16 government shall adopt any rules, regulations or
17 ordinances or take any other actions that
18 prohibit, limit, regulate, subject to approval or
19 in any other way affect forest practices on forest
20 lands located outside of an acknowledged urban
21 growth boundary." (Emphasis added.)

22 ORS 527.620(4) and (5) set out the following definitions:

23 "(4) 'Forest land' means land which is used for
24 the growing and harvesting of forest tree
25 species, regardless of how the land is zoned
26 or taxed or how any state or local statutes,
27 ordinances, rules or regulations are applied.

¹The first two site plans submitted by petitioner were unacceptable to the county. After a hearing on October 22, 1990, the circuit court ordered petitioner to complete its application for design review approval by complying with a letter from the county public service manager advising petitioner how to revise its site plan. A third site plan was submitted by petitioner on November 16, 1990. The DRC requested a more detailed landscaping plan. Record 67. On February 15, 1990, petitioner submitted a detailed berm/landscaping plan. Record 117.

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"(5) 'Forest practice' means any operation conducted on or pertaining to forest land, including but not limited to:

"(a) Reforestation of forest land;

"(b) Road construction and maintenance;

"(c) Harvesting of forest tree species;

"(d) Application of chemicals; and

"(e) Disposal of slash."

Petitioner contends ORS 527.722(1), quoted above, prevents the county from applying the provisions of the ZDO to petitioner's operation on the subject property. Petitioner notes the subject property is not within an urban growth boundary. Petitioner argues that its operation is located near highly productive forest lands, uses primarily debris from logging operations and is an essential part of commercial tree harvesting operations. According to petitioner, its operation provides a means of disposing of slash without the smoke or hazards of burning, while producing a useful fuel.

ORS 522.722(1) prohibits the county from regulating "forest practices on forest lands" located outside of UGBs. Petitioner's operation is industrial in nature, involving the processing of logging debris, as well as woody debris from other sources, into an industrially used product. Petitioner's operation does not constitute the "harvesting of forest tree species" or "disposal of slash" as those

1 terms are used in the ORS 527.620(5) definition of "forest
2 practice." Further, the subject property is not "land which
3 is used for the growing and harvesting of forest tree
4 species," and consequently is not "forest land," as that
5 term is defined by ORS 527.620(4). Therefore, ORS
6 527.722(1) does not apply to petitioner's operation.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 "The findings that paving and gravel are
10 'necessary to control dust, mud and gravel' and
11 'to assure safe access' and 'retain safety on
12 Highway 224' are not supported by substantial
13 evidence in the whole record."

14 The DRC decision imposed the following condition:

15 "The access, from the [Highway 224] pavement edge
16 to the property line shall be paved, with the
17 remainder of the access and parking areas being
18 surfaced with crushed rock or better." Record 54.

19 In upholding the imposition of this condition, the hearings
20 officer adopted the following finding:

21 "* * * The Hearings Officer finds that this
22 condition is necessary to control dust, mud and
23 gravel, and given this type of use, these
24 improvements are necessary to assure a safe access
25 and to retain safety on State Highway 224."
26 Record 3.

27 Petitioner argues that neither the imposition of the
28 above quoted condition nor the above quoted finding is
29 supported by substantial evidence in the record. According
30 to petitioner, "[t]he Carver site has been a mill for
31 decades with logging trucks arriving and lumber and fuel

1 trucks leaving -- without any safety concerns." Petition
2 for Review 5. Petitioner also argues that visibility along
3 Highway 224 is good in both directions at the access to its
4 operation.

5 The county cites 15 pages in the record, contending
6 this evidence constitutes substantial evidence supporting
7 the above quoted finding.

8 Substantial evidence is evidence a reasonable person
9 would rely upon in reaching a decision. City of Portland v.
10 Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475
11 (1984); Douglas v. Multnomah County, 18 Or LUBA 607, 617
12 (1990). We have reviewed all evidence cited by both
13 parties. That evidence includes a staff report which makes
14 the same statement in support of the condition at issue as
15 the challenged finding, and a letter from the North
16 Clackamas School District, a neighboring property owner,
17 stating the requirements imposed by the condition are the
18 minimum necessary for safety and to reduce dust and mud.
19 Record 99, 101. Further, nothing else cited conflicts with
20 or undermines this evidence. We conclude there is
21 substantial evidence in the record to support the challenged
22 finding.

23 The second assignment of error is denied.

24 **THIRD ASSIGNMENT OF ERROR**

25 "The [requirements] that the landscaping design
26 [have] 'more native trees and shrubs' and that the
27 design must provide for a 'rolling berm' are not

1 supported by substantial evidence in the whole
2 record."

3 The "Detailed Berm/Landscaping Plan" in the record is
4 at a scale of 1:240 and depicts a berm extending along
5 Highway 224 for about 400 feet. It shows the location and
6 heights of approximately a dozen existing fir trees along
7 the edge of Highway 224. It also depicts, on the front side
8 of the berm, 40 "fir trees," in six groups of six or seven
9 trees. Eleven of the proposed fir trees are indicated as
10 four feet or taller, the remainder as one foot six inches to
11 four feet. This plan also includes a "Cross Section Showing
12 Rolling Top of Berm Looking from Highway 224." Record 117.

13 The DRC decision imposed the following condition:

14 "A detailed landscaping plan for the berm shall be
15 submitted to address the following:

16 "A. Utilize more native trees and shrubs with
17 varying height and spacing.

18 "B. The berm shall have a rolling nature so that
19 it does not appear to be a wall; the maximum
20 slopes shall be 2 1/2:1 for the front side,
21 and 1 1/2:1 for the back side.

22 "C. The plan shall be at a larger scale (1:20 or
23 1:40)." Record 55.

24 In upholding the imposition of this condition, the hearings
25 officer adopted the following finding:

26 "* * * [Petitioner] objects to the requirement to
27 plant more native trees and to provide a rolling
28 berm, but has provided no substantial evidence as
29 to why the [DRC's] requirement is in error. The
30 Hearings Officer notes that the [DRC] is created
31 specifically to serve as expert advisors in the
32 review of development applications, to take

1 advantage of the specific technical skills of the
2 diverse membership of the committee, including
3 [reviewing] landscaping and screening necessary to
4 protect the public welfare and to comply with the
5 15 percent minimum landscaping requirement of the
6 [RI] zoning district ([ZDO 604.08D]). The
7 Hearings Officer accepts the expert determination
8 of the [DRC]." Record 3-4.

9 Petitioner contends there is no evidence in the record
10 to support either the requirement for "more native trees and
11 shrubs" or the requirement that the proposed berm have a
12 "rolling nature." Petitioner also argues the record shows
13 that its proposed berm is similar to other berms in the
14 surrounding area. Petitioner further argues that because
15 the term "more" is not quantified and the term "rolling" is
16 not defined, the condition is unconstitutionally vague.

17 The county cites 24 pages of the record which it
18 contends contain substantial evidence supporting the
19 imposition of the challenged condition. These pages include
20 the DRC decision. The county argues that under ZDO 1009.05
21 ("Screening and Buffering"), the DRC "may determine the
22 appropriate method to screen or buffer, considering the
23 nature of the impacts to be mitigated," and the hearings
24 officer is entitled to rely on the DRC's professional
25 judgment. Respondent's Brief 6. The county further argues
26 the nature of berms approved for other uses is irrelevant,
27 as design review is specific to each site and use.

28 This Board is authorized to reverse or remand the
29 challenged decision if it is not supported by substantial

1 evidence in the whole record. ORS 197.835(a)(C). We have
2 stated that when the evidentiary support for imposition of a
3 condition of approval is challenged, what must be determined
4 is whether the evidence in the record would lead a
5 reasonable person to conclude that there is a need for the
6 condition to further a relevant planning purpose. Sellwood
7 Harbor Condo Assoc. v. City of Portland, 16 Or LUBA 505, 522
8 (1988); Benjamin Franklin Dev. v. Clackamas County, 14
9 Or LUBA 758, 761 (1986).

10 Our review of petitioner's evidentiary challenge is
11 made more difficult by the fact that neither the hearings
12 officer's decision, nor the DRC decision which it affirms,
13 explains the purpose for which the county imposed the
14 requirements that the proposed berm have (1) a "rolling
15 nature," and (2) more native trees and shrubs.² The
16 hearings officer's decision does state that the DRC has
17 special expertise in determining the landscaping and
18 screening necessary to protect the public welfare³ and to

²We note that petitioner does not challenge the adequacy of the county's findings to support imposition of the challenged condition. See Cummins v. Washington County, ___ Or LUBA ___ (LUBA No. 91-068, October 1, 1991), slip op 5 (where a relevant issue is raised below concerning the local government's basis for imposing a disputed condition of approval, the local government is required to adopt findings addressing that issue).

³The hearings officer may be referring to ZDO 1303.12B.1, which provides that an administrative action may be approved subject to conditions which are "reasonably calculated to [protect] the public from the potentially deleterious effects of the proposed use." An appeal of a DRC decision to the hearings officer is processed as an initial administrative action. ZDO 1102.04A.5; 1305.01K.

1 comply with ZDO 604.08D,⁴ but does not explain why the DRC
2 imposed the challenged condition. Without an explanation of
3 the purpose of the condition, it is more difficult for us to
4 conclude that the evidence in the record would lead a
5 reasonable person to conclude there is a need for the
6 condition to further a relevant planning purpose.

7 Nevertheless, we have reviewed the evidence in the
8 record cited by the parties. That evidence consists mainly
9 of petitioner's site plans and photographs of the subject
10 site.⁵ The only other evidence cited is the North Clackamas
11 School District letter, which includes a statement that
12 "[t]he berm, slope and vegetation requirements are necessary
13 to buffer the visual impact." Record 98. Based on this
14 evidence, a reasonable person could certainly conclude there

⁴ZDO 604.08D provides that in the RI zone, a minimum of 15 percent of the site area shall be used for landscaping. It further provides, as relevant:

"* * * In applying the provisions of [ZDO] Section 1009 ["Landscaping"], emphasis shall be as follows:

- "1. The function of landscaping in this district shall be to enhance the appearance of the site from all major arterials and scenic roads and from a distance.
- "2. * * * Use of indigenous plant materials shall be encouraged.

"* * * * *"

⁵The pages of the record cited by the county include the DRC decision. Record 51-55. However, the DRC decision and the conditions it adopted are what was reviewed by the hearings officer. The DRC decision and conditions are not evidence which can support the hearings officer's decision.

1 is a need for a berm to provide visual screening along
2 Highway 224. However, we do not believe this evidence would
3 lead a reasonable person to conclude there is a need for the
4 proposed berm to have a "rolling nature" and "more native
5 trees and shrubs." Therefore, imposition of the challenged
6 condition is not supported by substantial evidence in the
7 record.⁶

8 The third assignment of error is sustained.⁷

9 **FOURTH ASSIGNMENT OF ERROR**

10 "The findings that a 'signed maintenance contract
11 or a performance bond' is required by ZDO
12 1009.10(F) is an improper construction of the
13 applicable law."

14 The challenged decision affirms the DRC's decision to
15 impose the following condition:

16 " * * * The developer shall also submit a signed

⁶Because the imposition of the challenged condition lacks evidentiary support, and because petitioner's constitutional argument is undeveloped, we do not consider whether the challenged condition is unconstitutionally "vague." However, we note that if the county chooses to reapply such a condition after remand, it should consider whether the terms "more" native trees and shrubs and "rolling nature" are sufficiently specific to inform petitioner of what it needs to do to obtain approval of its final landscaping plan. See Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978).

⁷Because neither the hearings officer's decision, nor the DRC decision which it upholds, includes findings addressing the applicable landscaping approval criteria of ZDO 604.08D and 1109, we cannot determine whether the county relied on the disputed condition in determining compliance with applicable criteria. Further, we understand the county to argue that the disputed condition is necessary for compliance with ZDO 1109.05. In these circumstances, sustaining petitioner's evidentiary challenge to the disputed condition requires us to remand the challenged decision. Compare Oleson Memorial Clinic v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-041, August 1, 1991), slip op 9.

1 maintenance contract, or post a bond or other
2 surety acceptable to Clackamas County, covering
3 the landscape maintenance costs during the [one
4 year] guarantee period." Record 54.

5 On December 13, 1989, ZDO 1009.01F was amended to
6 provide:

7 "All landscape materials will be guaranteed in
8 writing by the developer for a period of one year
9 from the date of installation. * * * The
10 developer shall also submit a signed maintenance
11 contract, or post a bond or other surety
12 acceptable to Clackamas County, covering the
13 landscape maintenance costs during the guarantee
14 period."

15 As petitioner's site application for design review approval
16 was filed after December 13, 1989, the above quoted version
17 of ZDO 1009.01F applies.⁸ ORS 215.428(3). The language of
18 the challenged condition is taken directly from ZDO 1009.01F
19 and, therefore, does not improperly construe the applicable
20 law.

21 The fourth assignment of error is denied.

22 The county's decision is remanded.

⁸Petitioner's argument under this assignment of error is based on the erroneous assumption that the prior version of ZDO 1009.01F is applicable.