

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a Clackamas County hearings officer
4 decision approving a parking area as a conditional use.

5 **FACTS**

6 This is the second time a county decision approving the
7 subject parking area has been before this Board.¹ In
8 Reynolds v. Clackamas County, 21 Or LUBA 412, 413 (1991)
9 (Reynolds I), we described the facts as follows:

10 "VFW Post 4248 (applicant) filed an application
11 for conditional use approval for a parking area on
12 a 50 X 100 ft. lot zoned Urban Low Density
13 Residential, 7,000 square foot minimum lot size
14 (R-7). The subject lot is currently vacant. The
15 house which was on the property was demolished
16 after the applicant's purchase of the lot. The
17 subject lot is adjoined by an existing parking
18 area to the north, S.E. 72nd Street to the east,
19 S.E. Alberta Ave. to the south and petitioner's
20 property to the west. The proposed parking area,
21 as well as the existing parking area to the north,
22 would serve the VFW Post building, which is
23 located to the west of the existing parking area.
24 The VFW Post building includes a kitchen and a
25 cocktail lounge, and is used for fraternal and
26 social events, including bingo games.

27 "All property on the subject block is zoned R-7.

28 * * *

29 "Petitioner owns and resides on the lot adjoining
30 the subject lot to the west. Petitioner's
31 property is contiguous to the VFW Post building to

¹The local record submitted in the first appeal is included in the local record in this appeal. We cite the local record in the first appeal as "Record I ___" and the local record compiled subsequently to the first appeal as "Record ___."

1 the north. * * *. To the west of petitioner's
2 property is another parking area serving the VFW
3 Post building." (Footnote omitted.)

4 **ASSIGNMENT OF ERROR**

5 "The Hearings Officer's Decision is not Supported
6 by the Substantial Evidence in the Whole Record."

7 Clackamas County Zoning and Development Ordinance
8 (ZDO) 1203.01.D establishes the following criterion for
9 approval of a conditional use:

10 "The proposed use will not alter the character of
11 the surrounding area in [a] manner which
12 substantially limits, impairs, or precludes the
13 use of surrounding properties for the primary uses
14 listed in the underlying districts."

15 In Reynolds I, 21 Or LUBA at 416-17, we explained the
16 basis for remanding the county's decision as follows:

17 "The county's decision concedes that the proposed
18 parking area will cause additional negative
19 impacts on residential use of petitioner's
20 property. The county cites no evidence in the
21 record that (1) these impacts, added to the
22 impacts from the existing operation, will not
23 substantially limit or impair residential use of
24 petitioner's property, or (2) required mitigation
25 measures will reduce the additional impacts to the
26 point that residential use of petitioner's
27 property is not substantially impaired.

28 "* * * We conclude, based on a review of the
29 evidence cited, that a reasonable person would not
30 have concluded that the proposed use will not
31 substantially limit or impair residential use of
32 petitioner's property. Therefore, the county's
33 determination that the proposed use complies with
34 ZDO 1203.01.D is not supported by substantial
35 evidence in the record." (Footnote omitted;
36 emphasis in original.)

37 In Reynolds I, 21 Or LUBA at 413 n 1, we noted that in

1 a separate proceeding, the county had granted conditional
2 use approval for the parking lot to the west of petitioners'
3 property and for an addition to the existing VFW post
4 building to the north of petitioner's property. In the
5 above quoted statement that the county's decision must be
6 supported by evidence that the impacts of the proposed
7 parking lot, "added to the impacts from the existing
8 operation," will not substantially limit use of petitioner's
9 property, we interpreted ZDO 1203.01.D to require
10 consideration of the cumulative impacts of these adjacent
11 developments on the use of petitioner's property.²

12 After Reynolds I, the county hearings officer held an
13 additional evidentiary hearing on the subject application.
14 The new evidence submitted to the county includes testimony
15 that public bingo games at the VFW post have increased from
16 two to three nights a week since the county made its
17 original decision on the subject application. Record I 39;

²Respondent argues in its brief here, as it did in Reynolds I, that ZDO 1203.01.D allows approval of the proposed parking lot if the county finds that the impacts of the proposed parking lot, in themselves, are not sufficient to substantially limit residential use of petitioner's property, regardless of impacts on residential use of petitioner's property due to previously approved development. As described in the text, we rejected that argument in Reynolds I. In any case, the challenged decision refers to the adverse effects on residential use of petitioner's property due to impacts of the existing VFW post and parking lots, before discussing the additional impacts that would be caused by the proposed parking lot. Record 12. We therefore assume the challenged decision's conclusion that with required mitigation measures, the proposed parking lot will not substantially limit residential use of petitioner's property properly reflects consideration of the cumulative impacts of the existing and proposed development on petitioner's property.

1 Record 53. It includes a letter from a real estate broker
2 (broker's letter) which states he viewed the VFW post,
3 petitioner's property and the surrounding neighborhood and
4 that he concludes the proposed parking lot will not
5 "substantially impair the use of [petitioner's] property for
6 residential purposes." Record 8. The evidence also
7 includes an affidavit by the commander of VFW Post 1442
8 (commander's affidavit) stating that his post has a
9 membership comparable in size to the subject VFW Post 4248
10 and the activities at Post 1442 are similar to those at
11 Post 4248. The affidavit also states that Post 1442 owns a
12 residential rental property adjacent to that post's parking
13 lot and has "had no problems keeping tenants * * *."
14 Record 95. The commander's affidavit concludes that the
15 proposed Post 4248 parking lot expansion will not "impair
16 surrounding properties from being used for residential
17 purposes." Id. Finally, the new evidence includes
18 photographs of Post 1442, its parking lot and the adjacent
19 rental residence. Record Exhibits 17R - 21R.

20 On March 30, 1992, the hearings officer adopted a new
21 decision approving the subject conditional use application.
22 The new decision recognizes that the proposed parking area
23 will cause additional negative impacts on residential use of
24 petitioner's property, but relies on "conditions of approval
25 * * * designed to insure that any additional adverse impact

1 is minimal." Record 12.³

2 Petitioner argues the county's determination of
3 compliance with ZDO 1203.01.D is not supported by
4 substantial evidence in the whole record. Petitioner
5 contends the broker's letter is conclusory, does not explain
6 his understanding of the activities at the VFW post and does
7 not document the author's expertise to render an opinion on
8 this issue. Petitioner also argues the commander's
9 affidavit does not constitute substantial evidence because
10 the record does not demonstrate that the situation at
11 Post 1442 is truly comparable to that at Post 4248.

³The relevant conditions provide:

"1. Design Review approval of the parking area is required. This review shall specifically include consideration of a landscaping and/or fencing plan along the westerly property line designed to minimize any noise or light impacts from the parking area. Design review shall also specifically require any outdoor lighting associated with the parking area shall be deflected so as not to shine onto Tax Lot 15500, adjacent to the west. * * *

"The owner of Tax Lot 15500 [petitioner] shall be given notice and an opportunity to participate in all Design Review proceedings.

** * * * *

"3. All new parking areas shall be hard surfaced to reduce noise and dust.

** * * * *" Record 13.

Condition 3 is identical to, and condition 1 very similar to, conditions imposed by the county decision appealed in Reynolds I. The only significant difference in condition 1 is the addition of the statement that design review shall require that any outdoor lighting be deflected so as not to shine on petitioner's property. Compare Record I 4 and Record 13.

1 Petitioner contends the record shows Post 1442 offers bingo
2 games once a week, whereas Post 4248 offers bingo games
3 three times a week. Petitioner argues the record does not
4 establish that Post 1442 serves alcohol, as does Post 4248.
5 According to petitioner there is also a significant
6 difference in that Post 1442 is the owner of the adjacent
7 rental property and, therefore, dictates the terms for
8 occupancy of that dwelling. Finally, petitioner argues
9 there is no evidence in the record demonstrating that the
10 conditions imposed will be effective in mitigating the
11 adverse impacts on petitioner's use of his property for
12 residential purposes caused by the additional parking lot.

13 We have reviewed the evidence in the record cited by
14 the parties. The effect of the challenged decision is that
15 petitioner's property will be bordered on three sides by the
16 VFW post and its parking lots. The record shows the
17 existing VFW post and parking lots cause significant adverse
18 impacts on petitioner's property, including trespass by
19 intoxicated patrons' automobiles, noise from automobile
20 engines and glare from headlights. Record I 27-30, 55, 56;
21 Record 42-47. The record indicates the heaviest impacts
22 occur when the VFW post hosts public bingo games which draw
23 200 to 300 cars, and that the frequency of such events has
24 increased by 50 percent since the county made the decision
25 challenged in Reynolds I.

26 The only evidence arguably supporting the county's

1 decision are the broker's letter and the commander's
2 affidavit. The broker's letter states he "viewed" the
3 property, but does not indicate whether he observed the
4 property when the VFW post was hosting a bingo game or other
5 social function and the parking lots were being heavily
6 used. Also, the letter does not explain the basis for the
7 broker's conclusion. With regard to the commander's
8 affidavit, we agree with petitioner that the record does not
9 establish the situation at Post 1442 is similar to that at
10 Post 4248. Although the affidavit contains a conclusory
11 statement that activities at Posts 1442 and 4248 are
12 similar, the basis for that statement is not explained. The
13 commander's affidavit states there are "functions" at
14 Post 1442 once or twice a week. Record 95. It does not
15 explain the nature or size of those functions and whether
16 alcohol is served. Further, the photographs in the record
17 indicate Post 1442 is considerably smaller than Post 4248
18 and the rental house owned by Post 1442 is adjoined on only
19 one side by the post's parking lot.

20 As we stated in Reynolds I, 21 Or LUBA at 417:

21 "Substantial evidence is evidence a reasonable
22 person would rely on in reaching a decision. City
23 of Portland v. Bureau of Labor and Ind., 298 Or
24 104, 119, 690 P2d 475 (1984); Braidwood v. City of
25 Portland, 24 Or App 477, 480, 546 P2d 777 (1976).
26 * * *"

27 We see nothing in the evidence cited by the parties to cause
28 us to reach a different conclusion than we reached in

1 Reynolds I. We do not believe a reasonable person would
2 conclude, based on the evidence cited in the record, that
3 the proposed parking lot, as conditioned, will not
4 substantially limit or impair residential use of
5 petitioner's property. The county's determination of
6 compliance with ZDO 1203.01.D is not supported by
7 substantial evidence.

8 The assignment of error is sustained.

9 The county's decision is remanded.