BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCHROCK FARMS, INC., VERNON SCHROCK and DEAN SCHROCK, Petitioners, vs. LINN COUNTY, Respondent, and OREGON DEPARTMENT OF TRANSPORTATION, Intervenor-Respondent.	LUBA No. 95-058 FINAL OPINION AND ORDER

Appeal from Linn County.

Edward F. Schultz, Albany, filed the petition for review and argued on behalf of petitioners. With him on the brief was Weatherford, Thompson, Quick & Ashenfelter.

No appearance by respondent.

Lucinda D. Moyano, Assistant Attorney General, Salem, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Theodore R. Kulongoski, Attorney General.

HANNA, Referee; GUSTAFSON, Referee, participated in the decision.

AFFIRMED 03/21/96

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's adoption of a comprehensive plan amendment and an exception to Statewide Planning Goal 3, (Agricultural Lands) (Goal 3) to allow realignment of a portion of State Highway 34.

MOTION TO INTERVENE

The Oregon Department of Transportation (ODOT) (intervenor), the applicant below, moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

On December 21, 1995, petitioners submitted a request to file a reply brief, citing new issues intervenor raised in its brief. A reply brief accompanied the request. Intervenor does not object to the motion. Petitioner's motion to file a reply brief is granted.

FACTS

This appeal is before us for the third time.[1] In Schrock Farms I, we described the facts as follows:

"The subject property is an approximately 195 acre

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[1]Schrock Farms, Inc. v. Linn County, 24 Or LUBA 58 (Schrock Farms I), rev'd 117 Or App 390, 844 P2d 253 (1992) (Schrock Farms II).

Schrock Farms, Inc. v. Linn County, 25 Or LUBA 187 (Schrock Farms III), aff'd 121 Or App 561, 855 P2d 648 (1993) (Schrock Farms IV).

> commercial farm parcel owned by petitioners. The parcel is designated Agricultural Resource on the Linn County Comprehensive Plan (plan) map and is zoned Exclusive Farm Use (EFU). The subject property is adjoined by the original alignment of Highway 34 to the north and the city limits of the City of Tangent to the west.
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> "ODOT desires to realign a segment of Highway 34 between Interstate-5 and Highway 99E. ODOT's desired alignment crosses the subject property in an east-west direction. The realignment converts the subject property into two farm parcels. The northern parcel includes approximately 59 acres and the southern portion includes approximately 124 acres. The two farm parcels are separated by a five-lane segment of Highway 34 occupying approximately 12 acres." Schrock Farms I, at 59-60.

On January 31, 1990, ODOT filed an eminent domain claim in circuit court to permit it to acquire the subject property. This action was necessary to meet the Linn County Comprehensive Plan (LCCP) requirement that only a property owner can apply for a plan amendment. ODOT then filed an application with the county for a Goal 3 exception. The county approved the application, and petitioners appealed that approval to LUBA.

In Schrock Farms I we remanded the county's decision for the following reasons: (1) the Goal 3 exception was not valid because the county did not adopt it as part of its plan; (2) because the Goal 3 exception was not valid, the county was required to provide a justification for its failure to comply with ORS 215.283; and (3) the county erred in approving the application as a minor partition rather

than a major partition. Petitioners appealed that remand; however, they did not request a stay of LUBA's decision. ODOT took possession of the property and commenced work on the highway construction project. In Schrock Farms II, the Court of Appeals remanded our decision to us to apply ORS 215.283 or explain why a Goal 3 exception would obviate the need to apply ORS 215.283. On remand from the Court of Appeals, in Schrock Farms III we reversed the county's Goal 3 exception based on our application of ORS 215.283. Intervenor again appealed our decision, which the Court of Appeals affirmed in Schrock Farms IV.

In 1993, ORS 215.283 was amended at the request of ODOT to permit approvals such as that adopted by the challenged decision. ORS 215.283(3) now provides, in relevant part:

> "Roads, highways and other transportation facilities and improvements not allowed under subsections (1) and (2) of this section may be established, subject to the approval of the governing body or its designate, in areas zoned for exclusive farm use subject to:
>
> "(a) Adoption of an exception to a goal related to agricultural lands and any other applicable goal with which the facility or improvement does not comply; or
>
> "* * * * *"

Based on the amendment to ORS 215.283, in December 1993, intervenor applied again, this time for a plan amendment and Goal 3 exception. Intervenor's application was deemed complete on June 6, 1994. On April 6, 1994, before intervenor's application was deemed complete, the

circuit court dismissed ODOT's eminent domain claim. However, the circuit court order dismissing the claim was not entered until October 31, 1994.[2]

In order to justify the Goal 3 exception to allow the highway construction, intervenor was required to satisfy the reasons exception criteria of OAR 660-04-022(1) as follows:

> "* * * * *
>
> "(a) There is a demonstrated need for the proposed use or activity, based on one or more of the requirements of Statewide Goals 3 to 19;
>
> "* * * * *
>
> "(c) The proposed use or activity has special features or qualities that necessitate its location on or near the proposed exception site."

OAR 660-04-020 sets forth the four factors to be addressed in order to justify a reasons exception under OAR 660-04-022.[3] On March 15, 1995, the county approved the

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[2]Intervenor has appealed the circuit court dismissal, and that appeal is currently pending before the Court of Appeals.

[3]OAR 660-04-020(2) provides, in relevant part:

> "The four factors in Goal 2 Part II(c) required to be addressed when taking an exception to a Goal are:
>
> "(a) 'Reasons justify why the state policy embodied in the applicable goals should not apply': The exception shall set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land;

plan amendment and Goal 3 exception, and adopted the challenged decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that ODOT did not have legal authority to request that the county approve its

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> "(b) 'Areas which do not require a new exception cannot reasonably accommodate the use':
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> > "(A) The exception shall indicate on a map or otherwise describe the location of possible alternative areas considered for the use, which do not require a new exception. The area for which the exception is taken shall be identified;
> >
> > "(B) To show why the particular site is justified, it is necessary to discuss why other areas which do not require a new exception cannot reasonably accommodate the proposed use. Economic factors can be considered along with other relevant factors in determining that the use cannot reasonably be accommodated in other areas. * * *
> >
> > "* * * * *
> >
> > "(C) This alternative areas standard can be met by a broad review of similar types of areas rather than a review of specific alternative sites. * * *
>
> "(c) The long-term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception. * * *
>
> "(d) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts. The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resource and resource management or production practices. 'Compatible' is not intended as an absolute term meaning no interference or adverse impacts on any type with adjacent uses."

application. Petitioners raise two arguments: (1) that ODOT is not a property owner, as required by the plan; and (2) ODOT did not have authority to make the application.

A. ODOT is not a property owner as required by the plan

Petitioners contend, and intervenor does not dispute that under the plan, only a property owner may file a plan amendment request. Petitioners argue that ODOT's assertion that it is a property owner by virtue of eminent domain proceedings is in error. Petitioners contend that with the dismissal of ODOT's eminent domain claim by the circuit court on April 6, 1994, ODOT is no longer a property owner as required by the plan.

ODOT responds that its application, upon which the challenged decision is based, was deemed complete on June 6, 1994, and judgment was not entered on the circuit court order dismissing ODOT'S eminent domain claim until October 31, 1994. Intervenor reasons that because it still had a property interest when the application for a plan amendment was deemed complete, it had authority to submit the application.

The LCCP allows only property owners to file an application for a plan amendment. Article 32 of the Linn County Zoning Ordinance (LCZO) defines "owner" as one who has ownership of the land, and "ownership" as the existence of legal or equitable title to the land. The challenged decision finds that ODOT had an equitable interest in the

property sufficient to meet the requirements for ownership under its comprehensive plan. Record 34-35.

Petitioners do not contest the conclusion that the initiation of eminent domain proceedings gave ODOT the required property interest. They merely contend that the circuit court dismissal eliminated that interest. However, that dismissal became effective after the application was deemed complete. Petitioners have not explained how the circuit court dismissal affected ODOT's interest in the property.

B. ODOT did not have authority to file the application or eminent domain action

Petitioners argue also that ORS chapter 35 requires that the application leading to the challenged decision, which is contingent on an eminent domain proceeding "arise out of action taken by the Oregon Transportation Commission" (OTC). Petition for Review 5. Petitioners contend that because the earlier application could not be granted without a statutory change, the original application and eminent domain proceeding were not statutorily authorized. According to petitioners, "for ODOT to have authority to proceed in this second application, the Transportation Commission must authorize the act." Petition for Review 5. Petitioners neither explain why the OTC must authorize the subject application and eminent domain proceeding, nor cite any specific section of ORS chapter 35 that requires that the eminent domain proceeding arise out of action by the

OTC. We are unable to find such a requirement.[4]

Intervenor points to the OTC's approval of the State Transportation Improvement Program which could not be implemented fully absent the highway improvements sought through intervenor's application.

Petitioners have not demonstrated that the OTC must authorize the application and eminent domain proceeding, or that ODOT lacked authority to file the application.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the 1984 environmental impact statement (EIS), which the applicant submitted in support of its application and on which the county relied, was not substantial evidence to support the challenged decision.[5]

Petitioners argue that the EIS does not reflect additional development or changes in the law in the ten

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[4]ORS 35.215 is the only provision in ORS chapter 35 that can be construed to address petitioners' contention. It states:

> "'Condemner' means the state, any city county, school district, municipal or public corporation, political subdivision or any instrumentality or any agency thereof or private corporation that has the power to exercise the right of eminent domain."

ORS chapter 35 does not state how an entity described as a condemner obtains the power to exercise the right of eminent domain.

[5]Reference to the 1984 EIS includes both the Final Environmental Impact Statement (FEIS) and the Draft Environmental Impact Statement (DEIS). Petitioners initially argued that the DEIS is not in the record and that, therefore, the county's reliance on it was in error. Intervenors point to the place in the record in which the DEIS is found, at the last half of the FEIS volume. Consequently, it is in the record.

years between the time the EIS was prepared and intervenor's latest application. Petitioners do not, however, discuss whether there has, in fact, been any development in the intervening ten years or how any such development would impact the evidence contained in the EIS. Rather, petitioners contend that the amendment of ORS 215.283 to allow construction of a highway as requested by intervenor is a change that should be reflected in an EIS. Petitioners do not explain how the amendment to ORS 215.283 would affect the substance of the EIS, or any findings for which the county relied on the EIS for evidentiary support. In fact, petitioners do not point to any particular finding for which there is a lack of evidentiary support based on the EIS. Rather, petitioners' argument goes generally to the reliability and adequacy of the EIS as evidence.

The EIS is a compilation of information relevant to highway construction impacts, supporting demographic and statistical data and conclusions based on that material.[6]

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[6]In many instances the county relied on the EIS for locational description and orientation. It also relied extensively on vehicle usage data and the effects of that usage on the surrounding locale. Two examples of the type of data in the EIS relied on by the county in its findings are the following:

> "Alternative 1 required excavation of 26,000 c.y of rock, 541,000 c.y for rock embankment and 249,000 c.y. tons aggregate, compared to alternative 3, which would have require[d] excavation of 24,300 c.y of rock and 432,000 c.y. rock embankment and 244,000 tons aggregate (DEIS pp 37-38, Table 12.)" Record 9.

Although petitioners question the general reliability of the EIS, they do not submit any evidence that undermines the use of the EIS as evidence for the specific findings.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(7)(a)(C). Bottum v. Union County, 26 Or LUBA 407, 412 (1994) In Bottum, the petitioners contended that a decision was not supported by substantial evidence. They did not, however, point to evidence that undermined the data or conclusions in a report on which the county relied as substantial evidence to support its decision.[7] Absent such identification, LUBA found the report reliable as substantial evidence.

Petitioners' challenge to the reliability of the EIS based on its age, is insufficient in itself to challenge the

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> "Alternative 1 was the alternative most consistent with the planning efforts already undertaken for the City of Tangent, while Alternative 3 was not consistent with the Tangent Comprehensive Plan (FEIS, pp 2, 5 & DEIS pp 27-28 & Figure 14.)" Record 10.

[7]LUBA has accepted evidence as substantial even in instances where it is dated or is less than completely reliable. See Wilson Park Neigh. Assoc. v. City of Portland, 27 Or LUBA 106, 113, rev'd on other grounds 129 Or App 33, rev den 320 Or 453 (1994) (some inadequacies in a study does not undermine or refute its basic reliability); Heine v. City of Portland, 27 Or LUBA 571, 577 (1994) (1990 traffic study was not undermined by a 1992 traffic study); Reeves v. Washington County, 24 Or LUBA 483, 490 (1993) (absent some indication that the information that provided basis for a report was unreliable, the report was accepted as substantial evidence); Holladay Investors, Ltd. v. City of Portland, 22 Or LUBA 90, 99 (1991) (report adopted two years earlier was considered adequate where petitioner established only minor changes since it was prepared).

substantiality of the evidence upon which the county based its decision. Petitioners have not identified evidence in the record which undermines the EIS or other evidence on which the county based its conclusion. Absent such identification that would compel a conclusion that a reasonable person could not have reached the county's conclusion, we cannot find the county's findings lack substantial evidence.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The challenged decision includes the following language, labeled "condition":

> "The following condition is part of the decision:
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> "The county finds that the drainage system designed by the Oregon Department of Transportation to handle water from the realigned highway, which crosses the Schrock Farms property, was adequate. The county does not believe it was ODOT'S responsibility to design a drainage system to handle water generated from upstream properties or resulting from downstream conditions which are unrelated to an ODOT facility. To ensure that the drainage system continues to function as designed, ODOT will monitor drainage onto the Schrock property. Specifically ODOT will evaluate drainage flow and any ponding generated from the highway right-of-way onto the Schrock property. The drainage monitoring will occur for a five year period beginning in March, 1995 and continue through the spring of each year. Subsequent drainage improvements may be required to mitigate drainage impacts if the County concludes that highway improvements have created drainage impacts which do not accommodate water associated with a 25 year or less flood level." (Emphasis added.) Record 20-21.

Petitioners argue that the county erred in conditionally approving the goal exception. Petitioners state:

> "The purpose of this Assignment of Error is to determine if the local decision maker can make its decision on [whether] compliance with the criteria for approval of a goal exception can be met with the application of certain condition or whether there must be a complete showing of compliance." (Emphasis added.) Petition for Review 8.

OAR 660-04-020(2)(d) requires that:

> The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.[8]

We understand petitioners to argue that compliance with the compatibility standard must be achieved prior to approval of the exception. However, OAR 660-04-020(2)(d) clearly permits approval so long as compatibility will be achieved "through measures designed to reduce adverse impacts." Petitioners do not contend under this assignment of error that the measures stated in the above-quoted condition will not achieve compatibility.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue again that the county findings are not supported by substantial evidence, in this instance because of surface water and other adverse impacts to

[8]This language is shown in context in note 2, supra.

petitioners' farming operations. Although petitioners do not identify any particular finding which lacks substantial evidence, they identify as the issues for which evidence is deficient, increased flow and ponding of surface water, increased costs and hazards to commercial farming operations and increased risk because of the limited access between the parcels separated by the roadway.[9] Petitioners describe the litigation risks to farmers who conduct farming activities near roadways, and contend that placing a roadway through the middle of a farm increases a farmer's exposure to litigation. Petitioners also point out that because of administrative rules requiring set-backs for burning of fields, construction of the highway will expand the area that cannot be burned. Petitioners contend that this will increase their costs of farming.

In response to petitioners' substantial evidence challenge, intervenor describes the historical context of the challenged decision. It describes the three alternatives explored by intervenor and the county to determine the impacts to numerous parcels affected by the proposal, as follows.

> "As a result, the county was required to compare and contrast the cumulative long-term environmental, economic, social and energy

[9]Additionally, petitioners do not establish that the identified water-related problems are the result of the highway construction rather than other causes.

> consequences on all properties affected by Alternative 1 with those properties affected by Alternative 3. The county found that Alternative 1, overall, would not have impacts that were significantly more adverse than would typically result from those associated with alternative 3." Intervenors Brief 11.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). We must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992). If there is substantial evidence in the whole record to support the city's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. Adler v. City of Portland, 25 Or LUBA 546, 554 (1993). Where the evidence is conflicting, if a reasonable person could reach the decision the city made, in view of all the evidence in the record, LUBA will defer to the city's choice between conflicting evidence. Mazeski v.

Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App, 258, 890 P2d 455 (1995); Bottum v. Union County, supra; McInnis v. City of Portland, 25 Or LUBA 376, 385 (1993).

To approve the exception, the county must rely on substantial evidence to meet the standards set forth in OAR 660-04-020(2)(c) and (d). The county addressed the compatibility of the proposed use with other activities as well as the environmental, economic, social and energy consequences of its decision, as required by OAR 660-04-020(2)(c) and (d). In doing so, the county looked at projected impacts on all affected properties, not just projected impacts on petitioners' property. Record 8-13 and 41-45.

LUBA must look at the evidence supporting the challenged decision for the entire four-mile stretch of highway and all the impacted properties, not just the evidence of the affects on one of the properties. The limited focus of petitioners' argument is not sufficient to undermine the evidence that supports the challenged decision.

The fourth assignment of error is denied.

The county's decision is affirmed.