

APR 30 5 11 PM '84

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	EARL C. MOORE,)	
)	
4	Petitioner,)	LUBA No. 83-125
)	
5	vs.)	FINAL OPINION
)	AND ORDER
6	CLACKAMAS COUNTY,)	
)	
7	Respondent.)	

8 Appeal from Clackamas County.

9 John H. Hammond, Jr., Oregon City, filed the petition for
10 review and argued the cause for petitioner. With him on the
brief was Hutchinson, Hammon & Walsh.

11 Jon Hendrickson, Gladstone, filed a brief and argued the
12 cause for Intervenor Harding.

13 No appearance by Respondent County.

14 DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee
participated in the decision.

15 AFFIRMED 04/30/84

16 You are entitled to judicial review of this Order.
17 Judicial review is governed by the provisions of Oregon Laws
1983, ch 827.

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1 Opinion by DuBay.

2 NATURE OF THE APPEAL

3 This is an appeal from an order approving a conditional use
4 permit for construction of a nine space parking lot for a
5 racquetball facility. The parking lot is located in a drainage
6 way classified by the county as a wetland. The permit required
7 consideration of county ordinances protecting wetlands as well
8 as conditional use permit criteria.

9 FACTS

10 This is the second appeal to LUBA of this project. The
11 first appeal resulted in a remand to the county. Moore v.
12 Clackamas County, 7 Or LUBA 106 (1982). LUBA remanded the
13 decision based on failure of the findings to include facts from
14 which the county could conclude applicable criteria had been
15 met. The opinion especially noted the lack of any evidence or
16 findings to refute petitioner's claims construction of the lot
17 would cause flooding of petitioner's adjacent property.¹
18 After the remand, the county Board of Commissioners held an
19 evidentiary hearing on September 7, 1983. The applicant
20 introduced testimony of an engineer regarding the effects of
21 parking lot construction on petitioner's property as well as
22 the wetland. At the conclusion of the hearing the
23 commissioners continued the matter to deliberate towards a
24 decision. At the continued meeting, the commissioners noted
25 there was a dispute about location of the property lines.
26 Because of the uncertainty they concluded there was only enough

1 space for parking six vehicles. A motion was made and adopted
2 to approve the lot for six spaces only, and the matter was
3 continued to another public meeting.

4 When the application was next discussed at a public meeting
5 on November 9, 1983, the county planning staff advised the
6 commissioners a new survey showed sufficient room for the nine
7 spaces originally applied for. Petitioner was at the meeting
8 and was invited to speak. He did so. Notwithstanding
9 petitioner's opposition, the commissioners approved the
10 conditional use permit for a nine space parking lot. This
11 appeal followed.

12 FIRST ASSIGNMENT OF ERROR

13 Petitioner claims consideration of the survey by the
14 commissioners on November 9, at a meeting ostensibly held for
15 deliberation only, was an introduction of new evidence after
16 the public hearing was closed and violates "considerations of
17 due process and fair play."² Petition at 4. Petitioner says
18 another scheduled hearing, held after public notice, is
19 required to open the record for new evidence. Although
20 petitioner was invited to speak at the November 9 meeting when
21 the new survey was discussed, he stated he was "surprised and
22 confused." Petitioner claims he was prejudiced by the
23 consideration of the new survey.

24 The fundamental attributes of a quasi-judicial land use
25 decision process include an opportunity to be heard, an
26 opportunity to present and rebut evidence, an impartial

1 tribunal, and a record of the proceedings with adequate
2 findings. Fasano v. Washington Co. Comm., 264 Or 574, 588, 507
3 P2d 23 (1973). Although the procedures used by a local
4 government must provide these basic attributes, due process
5 does not require the formalities of courtroom proceedings. For
6 example, witnesses need not be sworn, Green v. City of Eugene,
7 22 Or App 231, 538 P2d 368 (1975), and the right to rebut
8 evidence does not mean there is a right to cross examine
9 witnesses. Sunnyside Neighborhood v. Clackamas Co. Comm., 27
10 Or App 647, 557 P2d 1375 (1977).

11 LUBA considered the rights of parties to present rebuttal
12 evidence in two cases similar, but not identical, to the
13 situation presented here. In McCrystal v. Polk County, 1 Or
14 LUBA 145 (1980) this Board held there was no meaningful
15 opportunity to rebut evidence where the hearing body considered
16 new testimony after the public hearing had been closed, and the
17 petitioners, having no notice additional testimony would be
18 considered, did not appear. And in Lower Lake Subcommittee v.
19 Klamath Cty., 3 Or LUBA 55 (1981), LUBA held there was a denial
20 of due process in refusing to consider additional testimony
21 after allowing the opposing side to do so at an earlier meeting.

22 The situation here is not the same as in those two cases.
23 Petitioner Moore was present and testified at the meeting when
24 the new survey was first discussed. Although he stated he was
25 confused and surprised, he did not then express any opposition
26 to the survey or comment upon its accuracy, nor did he request

1 an opportunity to present additional evidence. He reiterated
2 his opposition to the parking lot whether six or nine spaces
3 were approved, and he contended either number would result in
4 flooding of his property. His attorney later wrote a letter to
5 the commissioners and also appeared before them to object to
6 consideration of the new survey after the Board announced the
7 public hearing closed, but no request was made to offer
8 rebuttal evidence. Both then and now before this Board,
9 petitioner has not said how the consideration of the survey has
10 prejudiced petitioner's right to a fair hearing.

11 Section 1304.02 of the county zoning ordinance provides:

12 "REVIEW BY THE BOARD OF COUNTY COMMISSIONERS; A review
13 by the Board of County Commissioners shall be
14 accomplished in accordance with its own adopted Rules
15 of Procedure. The Board of County Commissioners may
16 continue its hearing from time to time to gather
17 additional evidence or to consider the application
18 fully. If the matter is continued to a time certain,
19 no additional notice need be given of continued
20 hearings unless otherwise provided by the Board."

21 We do not view the facts in this case to constitute a
22 violation of the county ordinance. The petitioner was afforded
23 opportunity to rebut the survey. Neither he nor his attorney
24 requested the right to present additional evidence after the
25 new survey was first considered, and, most importantly,
26 petitioner has not alleged what prejudice he suffered from
27 failure to commence another public hearing by another public
28 notice. ORS 197.840(8)(B). See Morrison v. Cannon Beach, 6 Or
29 LUBA 74, 77 (1982). This assignment of error is denied.

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1 SECOND AND THIRD ASSIGNMENTS OF ERROR

2 Petitioner says the property on which the parking lot is
3 located is in a flood plain, and therefore the county's
4 comprehensive plan provisions regarding development in areas
5 subject to flooding apply. These assignments of error claim
6 the order violates the plan because it authorizes development
7 that restricts the natural flow and significantly increases
8 flood elevations.

9 The county's comprehensive plan provides:

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11 "Restrict development and/or fill in the flood fringe
12 to insure that danger to life and property will not
13 result. The natural flow of water should not be
14 restricted, nor shall development which would
15 significantly increase flood elevations be
16 permitted." Clackamas County Comprehensive Plan at 73.

17 Petitioner presented evidence, his own testimony and
18 photographs, of the flooding that has occurred on his land.
19 Based upon his knowledge of the area, having lived in the
20 neighborhood since 1932, he claimed the parking lot caused
21 flooding of his property. The flooding is caused, according to
22 petitioner, by narrowing the drainage channel, by causing
23 increased runoff, and by displacing water with fill material.
24 He argues the displaced water will increase the flooding on his
25 property. He says the order granting the permit will result in
26 these effects and is therefore in violation of §11.1 of the
Open Space and Flood Plain Element of the county's

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1 comprehensive plan.

2 The county's findings do not mention this plan provision.
3 However, the plan provision is worded in specific, prohibitory
4 terms. We note that findings adopted by the county with
5 reference to certain zoning code criteria directly address the
6 activities prohibited by the plan. Under these circumstances
7 we look to those findings to demonstrate compliance with the
8 plan.

9 Because the parking lot area was found by the county to be
10 a wetland, the proposal to construct off-street parking must be
11 measured against two sets of criteria in the county ordinance.
12 One set is comprised of the criteria applicable to all
13 conditional uses. These criteria are in §1203.01 of the zoning
14 ordinance.³ The second set is comprised of the wetland
15 criteria found in §1011 of the ordinance.⁴ The findings in
16 connection with these criteria include the following:

17 "Testimony of Engineer Hydrologist Cooper testified
18 that the .137 of an acre minute area in question at
the extreme edge of a 32 acre wetland would have no
effect on the wetland." Record 3.

19 "The proposed parking area is at the edge of the
20 wetland and Engineer Hydrologist Cooper presented
21 evidence that this proposal would not disturb the
22 wetland and further based upon his study the water
displacement would be so negligible as to not be
measurable." Record 3.

23 "... (A)nd based upon Engineer Hydrologist Cooper's
24 expert testimony this use will not exacerbate flooding
25 upstream or down, because the placement of gravel
would not increase runoff." Record 4.

26 "The expert testimony of Engineer Hydrologist Cooper
showed that the environment of the 32 acre wetland

1 would not be affected." Record 4

2 "The alteration at the edge of this 32 acre wetland
3 does not alter water movement or the rate of runoff as
4 per testimony of Engineer Hydrologist Cooper." Record
5 4.

6 "The proposed parking area will not alter the
7 character of the surrounding area in a manner that
8 limits the use of surrounding properties in any
9 additional matter. The testimony of Engineer
10 Hydrologist Cooper was that upstream or downstream
11 properties would not suffer in any manner for any
12 increased water levels." Record 4-5.

13 Not all of the above-quoted material can be read as the
14 findings and conclusions of the county. Some merely recites
15 what the engineer said and is thus a recitation of evidence
16 that does not state what the county found to be the facts.
17 However, when the material which does constitute findings is
18 examined, the findings state the placement of gravel will not
19 increase runoff, and the parking lot does not alter water
20 movement or increase water levels on adjacent properties.
21 These factors are the focus of §11.1 of the Open Space and
22 Flood Plain Element of the county's comprehensive plan.
23 Although petitioner claims the engineer's testimony and the
24 findings do not take into account the effect of water
25 displacement as a cause of flooding, we do not read the
26 findings as limited in that way. The finding that water levels
both upstream and downstream would not be affected by the
parking lot is sufficiently inclusive to take into account the
displacement of water as well as any other factors affecting
water levels.

1 Presented with conflicting evidence about the effects of
2 construction of the parking lot on water movement and flooding,
3 the commissioners found water levels would not be affected.
4 This Board is bound by that finding if it is supported by
5 substantial evidence in the whole record. ORS 197.830(11). We
6 believe the findings are adequate to state that the natural
7 flow of water will not be restricted and that flood elevations
8 will not be significantly increased. We also believe the
9 evidence supporting the findings meets the test for substantial
10 evidence. See our discussion of the engineer's testimony as
11 substantial evidence in the discussion of the sixth assignment
12 of error, page 13, infra. These assignments of error are
13 denied.

14 FOURTH ASSIGNMENT OF ERROR

15 Petitioner alleges the county failed to make a finding the
16 use will not adversely impact existing residential use.

17 The conditional uses allowed on the property by the zoning
18 ordinance include:

19 "Offstreet parking facilities in association with a
20 commercial or industrial use, within a transitional
21 area as defined in this ordinance." Section
22 301.05(A)(16) Clackamas County Zoning Ordinance.

23 Transitional areas are defined in the zoning ordinance as
24 follows:

25 "Transitional Area: The lot or lots within any
26 residential district, having a lot line abutting and
impacted by a boundary of a commercial or industrial
district and extending into the residential district
where such use will not adversely impact the existing
residential uses." Section 202 Clackamas County
Zoning Ordinance.

1 Petitioner contends this definition of a transitional area
2 requires the city to find the parking lot will not adversely
3 impact petitioners property, and the county failed to make such
4 a finding.

5 We first note §301.05 of the ordinance does not provide
6 offstreet parking may be allowed only where findings are made
7 showing no adverse impact on neighboring residential areas.
8 The ordinance simply allows offstreet parking in transitional
9 areas as a conditional use. If it were necessary to determine
10 whether an area is a transitional area, that determination
11 would likely require appropriate findings. All parties to this
12 proceeding, however, recognize the parking lot is on property
13 already designated on the county zoning map as a transitional
14 area. The necessary determination has already been made, and
15 no findings for that purpose were required in this proceeding.

16 We also note the conditional use criterion in §1203.01(D)
17 of the zoning ordinance has similar requirements in that the
18 proposal must be shown not to limit, impair or preclude the
19 basic allowed uses on surrounding properties. See discussion
20 under Assignment of Error No. 6, infra. When that criterion
21 was addressed, the county found "the proposed parking area will
22 not alter the character of the surrounding area in a manner
23 that limits the use of the surrounding properties in any
24 additional manner." Record 4. Even if the definition of a
25 transitional area may be interpreted to require a finding of no
26 adverse impact, this finding is adequate to meet the requirement.

Page This assignment of error is denied.

1 FIFTH AND SIXTH ASSIGNMENTS OF ERROR

2 The fifth and sixth assignments of error challenge the
3 findings showing satisfaction of two of the conditional use
4 criteria.

5 The first of the two criteria requires a demonstration that

6 "The characteristics of the site are suitable for the
7 proposed use considering the size, shape, location,
8 topography, existence of improvements and natural
9 features." Section 1203.01(B) Clackamas County Zoning
10 Ordinance.

11 The criterion requires the county to consider whether the
12 physical characteristics of the site are suitable for use as a
13 parking lot for the racquetball facility. The findings
14 disclose the county did consider several such characteristics
15 regarding suitability. Wetland types of vegetation and the
16 existence of standing water were noted. Record 2. The size of
17 the parking area in the wetland (.137 acre), and the size of
18 the wetland (32 acres) were included in the findings, as well
19 as the condition of the property (prior dirt and debris on the
20 parking area). Record 3. The county found the property to be
21 on the edge of the wetland, but neither the wetland nor water
22 movement in or through the wetland would be affected by the
23 parking lot. Record 4. In addition, the findings show the
24 property to be flat, located near McCloughlin Boulevard and
25 adjacent to the commercial use.

26 The shape of the property, one of the characteristics
listed in the criterion, was not included in the county's

1 analysis of site suitability. However, the shape of the
2 parking lot was not an issue at any time during the
3 proceedings, including the review before this Board. Although
4 shape is potentially important in many cases, it appears to be
5 an insignificant factor in this instance. We believe the
6 findings recite sufficient facts regarding the physical
7 characteristics of the site to support the county's affirmative
8 conclusion under §1203.01(B).

9 The second conditional use criterion brought to our
10 attention by petitioner requires a demonstration:

11 "(A) The proposed use will not alter the character of
12 the surrounding area in a manner which
13 substantially limits, impairs, or precludes the
14 use of surrounding properties for the primary
15 uses listed in the underlying district." Section
16 1203.01(D) Clackamas County Zoning Ordinance.

17 The findings regarding this criterion are as follows:

18 "1203.01(D)

19 "(1) The proposed parking area will not alter the
20 character of the surrounding area in a manner
21 that limits the use of the surrounding properties
22 in any additional manner. The testimony of
23 Engineer Hydrologist Cooper was that upstream or
24 downstream properties would not suffer in any
25 manner for any increased water levels." Record
26 pages 4-5.

27 Petitioner claims there is no substantial evidence to
28 support this finding because the engineer examined the area
29 only once when there was no flooding, and he did not address
30 the issues raised by §1203.01(D).

31 Substantial evidence consists of evidence which a
32 reasonable mind could accept to support a conclusion.

1 Braidwood v. City of Portland, 24 Or App 477, 546 P2d 777
2 (1976). In addition to the engineer's testimony that the
3 parking lot has no effect upstream or downstream on flooding,
4 he also testified the major cause of the flooding is the
5 restriction of water flow resulting from undersized culverts
6 downstream from the parking lot. Record 63, 64. Notably, the
7 downstream culverts were also pinpointed by petitioner as the
8 cause of flooding. He testified water levels would not be
9 reduced until the downstream culverts are corrected to allow the
10 water to drain away. Record 69. With the verification of the
11 engineer's statement of the cause of flooding, it is not
12 unreasonable to accept the engineer's further testimony that
13 the flooding is not affected by the construction of the parking
14 lot. Although petitioner's evidence based on 56 years of
15 experience with the property is also credible, the resolution
16 of such conflicts is the function of the hearings body, not
17 this Board. Christian Retreat Center v. Comm. for Wash. Co.,
18 28 Or App 673, 560 P2d 1100 (1977).

19 These assignments of error are denied.

20 ASSIGNMENTS OF ERROR SEVEN THROUGH TEN

21 These four assignments of error challenge the findings
22 addressing each of the four wetlands criteria as not supported
23 by substantial evidence in the record. The criteria call for
24 findings on the social, economic, energy and environmental
25 effects of the proposed use in a wetland. See footnote 4.
26 Not surprisingly, petitioner directs most attention to the

1 issue of flooding as caused by construction of the parking
2 lot. The findings related to that issue and the evidence
3 supporting them have been covered in the discussion of the
4 previous assignments of error and will not be repeated here.

5 There are two other issues raised by these assignments of
6 error. First, petitioner challenges the finding that the
7 parking lot is a benefit to the public. Section 1011.04(A) of
8 the zoning ordinance requires there be a benefit to the public
9 if development will cause either (1) the loss of rare,
10 irretrievable or irreplaceable natural features or scientific
11 opportunity, or (2) disturbance of a substantially unaltered
12 natural feature or area in or adjacent to the site. The county
13 expressly found the wetland will not be lost or disturbed, the
14 area is not a substantially unaltered natural feature or area
15 because of previous fill, and there is no evidence of any lost
16 scientific opportunity. The challenged finding of public
17 benefit is therefore not necessary where the county found the
18 conditions requiring a public benefit did not exist.

19 Petitioner challenges the findings of no loss or disturbance as
20 not supported by substantial evidence, but the challenge is
21 bottomed on his claim the parking lot causes increased flooding
22 problems. That claim was rejected by the county, and, as we
23 have previously stated, the county has the authority to weigh
24 the evidence and decide which credible evidence it chooses to
25 believe. As we do not find fault with the findings showing no
26 loss or disturbance of the wetlands, a scientific opportunity,

1 or a substantial unaltered feature, we will treat the findings
2 of public benefit as surplusage and unnecessary to the decision.

3 Lastly, petitioner challenges the finding that the owner of
4 the racquetball court will be substantially damaged without use
5 of the property for a parking lot. Petitioner says there is no
6 evidence of any damage at all if the parking lot were not
7 allowed. This findings address the criterion in §1011.04(B)(1):

8 "The wetland or significant Natural Area must be
9 disturbed for reasonable use of the site and, if not
10 disturbed, the applicant would be substantially
11 damaged."

12 We understand this language to mean the wetland may be
13 disturbed only if reasonably necessary to use the site and the
14 applicant would be substantially damaged if deprived of the
15 ability to disturb the wetland.

16 The county's findings specifically addressing this standard
17 are based on the engineer's testimony that the wetland will not
18 be disturbed or in any manner adversely affected. Although the
19 commissioners concluded the applicant will be damaged if
20 deprived of ability to use the property for a parking lot, they
21 did not note what or how damage will occur. However, because
22 the wetland was found not to be disturbed, this criterion,
23 stating the conditions that must be found before disturbance of
24 the wetland is authorized, is not applicable and the inadequacy
25 in the finding is not reversible error. .

26 Assignments of error 7 through 10 are denied.

1 The decision of the county granting the conditional use
2 permit is affirmed.

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FOOTNOTES

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4 During the course of the proceedings, the applicant
5 constructed the parking lot. The lot had fill placed on it
6 prior to the effective date of the zoning ordinance, and
7 development of the lot involved leveling the old fill and
8 surfacing the lot with crushed rock or gravel.

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8 We do not understand petitioner to base this claim on any
9 procedural requirement in the Clackamas County Code.

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10 Section 1203.01 of the zoning ordinance states:

11 "The Hearings Officer may allow a conditional use, after a
12 hearing conducted pursuant to Section 1300, provided that
13 the applicant provides evidence substantiating that all the
14 requirements of this Ordinance relative to the proposed
15 use are satisfied, and demonstrates that the proposed use
16 also satisfies the following criteria:

- 14 A. The use is listed as a conditional use in the
15 underlying district.
- 16 B. The characteristics of the site are suitable for the
17 proposed use considering size, shape, location,
18 topography, existence of improvements and natural
19 features.
- 20 C. The site and proposed development is timely,
21 considering the adequacy of transportation systems,
22 public facilities and services existing or planned
23 for the area affected by the use.
- 24 D. The proposed use will not alter the character of the
25 surrounding area in a manner which substantially
26 limits, impairs, or precludes the use of surrounding
properties for the primary uses listed in the
underlying district.
- E. The proposal satisfies the goals and policies of the
Comprehensive Plan which apply to the proposed use."

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"1011.04 CONFLICT RESOLUTION/WETLANDS AND SIGNIFICANT
NATURAL AREAS

"High priority open space wetlands and Significant Natural Areas shall not be disturbed unless approved by the Hearings Officer, pursuant to subsection 1300, for a specific commercial or industrial development plan. Approval shall not be granted unless the applicant demonstrates that the following social, economic, energy and appropriate environmental considerations are addressed and satisfied:

"A. Social: The proposed development would not result in the loss of a rare, irretrievable or irreplaceable natural feature or scientific opportunity, or the disturbance of a substantially unaltered natural feature or area in or adjacent to the proposed site, unless the benefit to the public from the proposed use clearly outweighs the public good from retaining the feature or area.

"B. Economic:

"1. The wetland or Significant Natural Area must be disturbed for reasonable use of the site and, if not disturbed, the applicant would be substantially damaged.

"2. The use proposed is a benefit to the community and meets a substantial public need or provides for a public good which clearly outweighs retention of the wetland or Significant Natural Area.

"C. Energy:

"1. Disturbance of the open space will not require public costs, including maintenance, due to secondary impacts, or exacerbate existing conditions.

"2. The development, as proposed, supports the Comprehensive Plan policies for energy efficient land use considering such things as transportation costs, efficient utilization of urban services, area self-sufficiency, and retention of natural features which create micro-climates conducive to energy efficiency.

"D. Environmental: Disturbance of the wetland or

1 Significant Natural Area is minimized, as provided
2 under subsection 1011.03C and the review process and
3 conditions of development pursuant to Section 1103,
4 and the following specific conditions applying to
5 wetlands or Significant Natural Areas are satisfied:

6 "1. Wetlands:

7 "(a) The wetland can be altered without
8 substantial adverse impact upon the
9 character of the area, and function of the
10 wetland.

11 "(b) The wetland does not support rare or
12 endangered species.

13 "(c) Elimination, alteration or relocation does
14 not significantly alter water movement,
15 including normal levels or rates of runoff
16 into and from wetlands.

17 "(d) The proposed use or alteration of the
18 wetland is approved by the U.S. Army Corps
19 of Engineers and the Division of State
20 Lands."

21 * * * *"