

LAND USE
BOARD OF APPEALS

JUL 7 12 03 PM '88

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

STANDARD INSURANCE COMPANY, an)
Oregon Corporation,)
Petitioner,)
vs.)
WASHINGTON COUNTY,)
Respondent,)
and)
LLOYD POWELL and ASSOCIATES,)
Intervenor-)
Respondent.)

LUBA No. 88-015
FINAL OPINION
AND ORDER

Appeal from Washington County.

Jack L. Orchard, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Ball, Janik & Novack.

No appearance by respondent Washington County.

Lawrence R. Derr, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were DeMar L. Batchelor, Hillsboro, of Schwenn, Bradley, Batchelor, Brisbee and Stockton, and Jeffrey J. Bennett, Portland, of Bauer, Hermann, Fountain and Rhoades.

BAGG, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

REVERSED 07/07/88

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 This case is about a Washington County Board of
4 Commissioners' decision granting development review approval
5 for a supermarket in excess of 35,000 square feet along with a
6 temporary permit for access onto N.W. 185th Avenue. Petitioner
7 requests that we reverse the decision or, in the alternative,
8 remand it to the county.

9 FACTS

10 The proposed development of a 43,000 square foot
11 supermarket with an additional 47,000 square feet of retail
12 space was approved by the county board of commissioners at its
13 meeting of January 19, 1988. In two prior review proceedings,
14 we considered a comprehensive plan amendment for the subject
15 property. The comprehensive plan amendment changed the use
16 designation from Industrial to Neighborhood Commercial (NC).
17 We remanded the county's first attempt at this comprehensive
18 plan change in Standard Insurance Co. v. Washington County, ___
19 Or LUBA ___ (LUBA No. 87-020, September 1, 1987) (Standard
20 Insurance I). Recently, we reviewed the county's order
21 following our remand. We again remanded the decision to
22 Washington County. Standard Insurance Co. v. Washington
23 County, ___ Or LUBA ___ (LUBA No. 88-005, June 7, 1988)
24 (Standard Insurance II). The development review approval
25 challenged in this appeal is predicated on the property being
26 designated NC as a result of the plan amendment considered in

1 our prior two cases.

2 PRELIMINARY ISSUE

3 The petition for review does not claim that remand or
4 reversal in Standard Insurance II must result in remand or
5 reversal of this decision. At the time of oral argument in
6 this case, Standard Insurance II was not decided. In response
7 to a question posed by the Board, petitioner claimed that a
8 remand in Standard Insurance II must necessarily result in the
9 invalidation of this decision because the industrial plan
10 designation extant on the property prior to the county's
11 decisions in Standard Insurance I and II does not permit the
12 proposed development.

13 Intervenor Lloyd Powell and Associates (respondent) argues
14 remand in Standard II need not automatically result in reversal
15 or remand in this case.¹ We understand respondent to argue
16 LUBA could condition affirmance in this case on a later
17 successful plan change following our decision to remand the
18 county's decision in Standard II. In any event, respondent
19 urges the Board to consider the assignments of error in this
20 appeal for the sake of economy of time, should the county elect
21 to remake or redo its decision in Standard Insurance II.

22 We do not have authority to affirm conditionally the
23 county's decision as respondent requests.² Under
24 ORS 197.835(1), we are empowered only to issue a final order
25 "affirming, reversing or remanding the land use decision." In
26 this case we must reverse the county's decision because it

1 permits a use not allowed under the applicable plan
2 designation. We note, however, that respondent appealed our
3 decision in Standard II, and that case is pending before the
4 Court of Appeals. Because our decision in Standard II may be
5 reversed or remanded, we will consider petitioner's assignments
6 of error.

7 FIRST ASSIGNMENT OF ERROR

8 "The applicant failed to demonstrate by substantial
9 evidence that the proposed supermarket serves the
10 public interest at the proposed location at this time."

11 Petitioner's first assignment of error is broken into four
12 subassignments of error concerning CDC Sections 311-1 and
13 202-3.4(C).

14 A. NC District Intent and Purpose

15 Petitioner begins with a claim that this development does
16 not meet the statement of intent and purpose of the
17 Neighborhood Commercial NC district. That statement is as
18 follows:

19 "Intent and Purpose. The purpose of the Neighborhood
20 Commercial District is to allow small to medium size
21 shopping and service facilities and limited office use
22 in Neighborhood Commercial centers. This district is
23 intended to provide for the shopping and service needs
24 of the immediate urban neighborhood. Neighborhood
25 Commercial locations should be easily accessible by
26 car and foot from neighborhoods in the area. Centers
27 should have minimal negative impact on surrounding
28 residential properties." Washington County Community
29 Development Code (CDC) Sec. 311-1.

30 Petitioner claims the applicant failed to show that the
31 intent and purpose of the district will be met by approval of
32 the grocery store and retail space. In particular, petitioner

1 complains the applicant failed (1) to establish the facility
2 constitutes a small to medium size shopping and service
3 facility; (2) to indicate how the proposal will meet the needs
4 of the immediate urban neighborhood; (3) to show the
5 supermarket is easily accessible by car or foot from
6 neighborhoods in the area; and (4) to demonstrate that the
7 supermarket shopping center will have minimal adverse impacts
8 on surrounding residential properties.

9 We do not find the intent and purpose section of the NC
10 district to be applicable to this proceeding. The intent and
11 purpose section of the planning district is neither an approval
12 criterion for a change in the planning district designation,
13 nor an approval criterion for development approval. See our
14 discussion in Standard Insurance I and II.³

15 This subassignment of error is denied.

16 B. Need for the Proposed Use

17 Petitioner's primary complaint is that the county failed to
18 apply properly CDC Section 202-3.4 This section provides that
19 a Type III development may be denied if

20 "A. The proposed development will have significant
21 adverse impacts on property values in the area;

22 "B. The proposed development will unduly conflict
23 with the character of an area not otherwise in
24 transition; or

25 "C. The public interest is not served by permitting
26 the proposed development to occur on the proposed
site at the proposed time. Development proposed
to serve significant portions of the County may
be evaluated for its impacts on the entire area
to be served."

1 Before discussing compliance with CDC Sec. 202-3.4(C),
2 petitioner argues that

3 "the request must be evaluated not only in terms of a
4 43,000 square foot supermarket but also the additional
5 retail facilities which a supermarket of that size
6 (according to the Applicant) must carry with it."
7 Petition for Review at 5.

8 According to petitioner, the county failed to review properly
9 the entire proposal against the code. This failure is error,
10 according to petitioner.

11 Respondent states that there is no basis in the CDC for
12 this position. Respondent points out that a food market with a
13 maximum of 35,000 square feet is a permitted use in the NC
14 district. CDC Section 311-4.4 The county claims that only the
15 gross floor area in excess of 35,000 square feet must be
16 evaluated. Specifically, respondent states that the code
17 provides that only this excess square footage need be evaluated
18 against CDC Section 202-3.4(C). In addition, respondent
19 advises the NC district does not limit the square footage a
20 commercial center may incorporate. Square footage restrictions
21 exist for specific uses, but there is no aggregate limit on the
22 number of square feet permissible in a shopping center within
23 the NC district. See CDC 311-3.1, 311-3.5 and 311-3.10.
24 Therefore, according to respondent, the additional retail
25 facilities to be developed with the new food market need not be
26 evaluated at all under CDC 202-3.4(C).

27 We believe respondent is correct. We do not believe it
28 necessary for the county to evaluate the total square footage

1 of the proposed center. The county need evaluate only the
2 8,000 square foot portion of the supermarket which exceeds the
3 35,000 square foot limit established under the code as a
4 "permitted use."

5 Petitioner turns to its argument about compliance with CDC
6 Section 202-3.4(C) by claiming there is no need for the
7 proposed supermarket. We presume petitioner believes a need
8 criterion exists in CDC Section 202-3.4(C) because it
9 authorizes denial of a proposal if "[t]he public interest is
10 not served * * *." Petitioner claims the applicant's analysis
11 of why there is a need for 43,000 square feet of additional
12 supermarket space may be summarized as (1) the result of
13 leakage of supermarket trade dollars from the Sunset West
14 Community Area to other localities; (2) a measure of the demand
15 for additional grocery facilities calculated in terms of the
16 current level of supermarket square footage and short term
17 projected household income within the Sunset West Community
18 Plan Area; and (3) a shortfall of grocery space for the Sunset
19 West Community Plan Area, measured at 8,620 square feet
20 presently and projected at 33,000 square feet in 1990.

21 Petitioner characterizes this square footage shortfall as based
22 upon an expenditure of all projected Sunset West grocery
23 dollars at three existing supermarkets plus amounts which would
24 be spent at the applicant's proposed store. Petitioner claims
25 the applicant erroneously assumes no grocery expenditures are
26 made or will be made at grocery stores other than in the Sunset

1 West trade area by Sunset West households.

2 Petitioner also attacks the notion that a new grocery store
3 will result in the recapture of all leakage of supermarket
4 trade dollars now being spent outside the Sunset West area.⁴
5 Further, petitioner characterizes the applicant as assuming
6 that no other grocery facilities will be constructed in the
7 Sunset West Community Planning Area.⁵ Petitioner claims
8 logic dictates that all of these assumptions are fundamentally
9 incorrect.

10 Nothing in the record shows that construction of the
11 supermarket will haul leakage, according to petitioner.
12 Petitioner claims the driving time the applicant uses as a
13 measure of its trade area (five minutes), when applied to the
14 Sunset West Community Area, makes existing grocery stores more
15 convenient than the proposed supermarket. Further, petitioner
16 says the applicant gives no explanation as to why Sunset West
17 residents will not continue to shop at grocery stores within
18 their own five minute driving time, but outside the new store's
19 trade area.

20 In addition, petitioner complains that the applicant
21 disregarded other grocery facilities in the area. While the
22 grocery stores are smaller, petitioner claims the applicant
23 erred by disregarding them. Petitioner sites evidence in the
24 record about grocery sales by convenience stores in other
25 locations. We understand petitioner to say such sales are
26 significant, and the respondent's failure to consider such

1 sales renders the evidentiary support for respondent's need
2 calculation inadequate. In addition to the convenience stores,
3 there exists a large warehouse type store, Costco. Half of
4 Costco's square footage is devoted to grocery items.

5 Petitioner complains the applicant did not take into account
6 expenditures by Sunset West community residents at Costco.

7 Respondent correctly points out that we considered the
8 methodology used for establishing need in Standard
9 Insurance I. Standard Insurance I, Slip op at 8. We found the
10 county's calculation of need to be reasonable. However, CDC
11 Section 202-3.4(C) arguably makes need an issue in development
12 review approval. We will therefore consider petitioner's claim.

13 The county relied on a report in calculating the need for
14 the new store. The report shows that a need exists for more
15 food market space. The report prepared by respondent Lloyd
16 Powell and Associates' planning consultants concludes (1) in
17 1990 there will be a demand for 33,000 more net square feet of
18 grocery space; and (2) by the year 2005 there will be a demand
19 for an additional 121,000 net square feet of grocery space in
20 the Sunset West trade area. The report also concludes that the
21 demand is sufficient to support four new 40,000 foot square
22 foot supermarkets. Record 432-3, Record 429-459.

23 In addition, respondent points out the county did consider
24 dollars spent at "quick stop and other similar neighborhood
25 stores in the trade area." Record 28. The county drew
26 conclusions based on its understanding of the amount of money

1 spent in such stores and nonetheless concluded that there
2 remained a need of nearly 45,000 gross square feet by 1990.
3 The county adhered to its original view that 43,200 square feet
4 of grocery sales space is needed. Record 28-29.

5 With respect to the Costco store, respondent's planning
6 consultant estimates Costco will draw approximately 1.8% of the
7 total available food dollars. Transcript 11-12. Petitioner
8 points to no evidence in the record suggesting that this figure
9 is incorrect. Even if petitioner's claim that 4.9% of the food
10 dollars are spent at convenience stores is enhanced by the 1.8%
11 share of food dollars the planning consultants claim are spent
12 at Costco, there still is a need for 44,011 square feet of food
13 market space, according to respondent Lloyd Powell. Therefore,
14 the county's conclusion that at least 43,200 square feet of
15 grocery sale space is needed is a valid figure.

16 We are cited to nothing in the record to suggest that
17 respondent's figures are wrong. Rather, it appears that
18 petitioner's disagreement is with the conclusions to be reached
19 from respondent's data. We do not find the arguments by
20 petitioner and the evidence cited by petitioner so undermines
21 the evidence supporting the county's conclusion as to make that
22 evidence not substantial. We conclude, therefore, that the
23 county's conclusion about need for the food market is supported
24 by substantial evidence in the whole record. Younger v. City
25 of Portland, 305 Or 346, 752 P2d 262 (1988).

26 This subassignment of error is denied.

1 C. Location of the Proposed Use

2 Petitioner next attacks the county's conclusion that the
3 proposed location of this facility is an appropriate one.

4 Petitioner questions why it is in the public interest to locate
5 a supermarket of this size on 185th Avenue rather than have
6 "disbursement of food store facilities within the Sunset West
7 plan area." Petition for Review at 17. Petitioner claims that
8 the applicant's proposal would produce a fivefold increase in
9 traffic on 185th Avenue. Petitioner states

10 "the question which should be posed to the Applicant
11 is whether the Albertson's store can exist at the
12 maximum, outright permitted density of 35,000 square
13 feet. If it can, there is no need for a store of
14 43,000 square feet. If it cannot, the Applicant
15 should explain why the public interest (not merely its
16 own economic interest) is served by a supermarket of
17 that size at this location, given the impacts on 185th
18 Avenue and the existence of several grocery facilities
19 along 185th." Petition for Review at 18-19.

20 Respondent characterizes petitioner's argument as attacking
21 whether the food market is appropriate in the neighborhood
22 commercial district. This question, according to respondent,
23 was answered in both the earlier LUBA appeals. Respondent
24 points out that DCD 202-34(C) authorizes the county to deny the
25 development if the public interest is not served by permitting
26 the development at the proposed site. Respondent states the
27 findings show the county believed that there were three factors
28 to be considered in locating the food market. The first of
29 these is convenience of location; the second is pattern of
30 existing grocery store locations; and the third is relationship

1 of grocery store groupings to evening peak hour traffic flow.
2 Record 29.

3 The county discussed the traffic on 185th Avenue projected
4 to the year 2000 and found that a significant portion of the
5 Sunset West community traffic will converge on this area on its
6 way home from work. The county then went on to discuss shopper
7 convenience as follows:

8 "Because shopper convenience is a major criterion for
9 locating food markets, the above-referenced triangle
10 is a logical location for the applicant's food
11 market. No other arterial intersections within the
12 trade area will experience this volume of evening peak
13 hour traffic and be centrally located within the
14 community. Accordingly, the applicant's site is
15 ideally located to satisfy an existing consumer demand
16 and demonstrated market need for additional food
17 market space.

18 "In addition, the applicant's site is the only site
19 within the Community Planning area that is designated
20 Neighborhood Commercial and at the same time is large
21 enough to support a large food market. Although other
22 large sites designated CDC could accommodate the
23 proposed use, Neighborhood Commercial sites are
24 intended to provide for the convenience needs of urban
25 neighborhoods." Record 30-31.

26 We believe the county's explanation adequate to meet the
27 criterion established in CDC Section 202-3.4(C). The county
28 explained why the public interest is served by permitting the
29 development on the proposed site, and we find nothing in
30 petitioner's argument to show that the county is mistaken.
31 Again, it appears petitioner simply disagrees with the county's
32 conclusion about the desirability of this development. We do
33 not believe this disagreement is a sufficient basis on which to
34 remand the county's decision.

1 With respect to the projected increase in traffic⁶,
2 respondent notes that the proposed shopping center will
3 generate approximately 77 trips per thousand square feet,
4 Record 3-4, and states that the county's imposition of
5 conditions to mitigate traffic impacts is sufficient to
6 accommodate this additional traffic.⁷ Record 31-32, 36 and
7 386-387. Respondent notes the petitioner does not suggest
8 these conditions are not sufficient to mitigate traffic impacts.

9 We agree. Petitioner does not explain why the increase in
10 traffic is not mitigated by the imposition of the conditions,
11 and we decline to find in petitioner's favor in this regard.
12 This subassignment of error is denied.

13 D. Impact on 185th Avenue

14 Lastly, petitioner claims that the applicant and the county
15 do not provide any indication of how 185th Avenue will function
16 as a major arterial with creation of a new signalized
17 intersection to serve this market facility. Petitioner claims
18 the existence of this supermarket is designed to stop the flow
19 of traffic on 185th and not to facilitate it. We understand
20 petitioner to argue that this fact shows the public interest is
21 not served by permitting the development to occur at this site.

22 Again, petitioner does not explain why the traffic impacts
23 generated by the development are not mitigated by the
24 conditions the county attached to the approval. We do not
25 believe further review is required.

26 The first assignment of error is denied.

1 SECOND ASSIGNMENT OF ERROR

2 "The county improperly granted a temporary access from
3 185th Avenue to the applicant's site."

4 The county development code at Section 501-5.2 (B)(5)
5 requires that access to arterials and major collectors must be
6 in accordance with Section 501-5.3. Section 501-5.3 (B)(4)
7 provides that only collectors and other arterial streets are to
8 be permitted direct access to arterials. An exception to this
9 arterial access standard, allowing temporary access under
10 Section 409-1.4, provides:

11 "No development shall be denied a Development Permit
12 for the sole reason that the parcel for which it is
13 sought cannot physically accommodate access
14 requirements of this Code. In such an event, the use
15 may be issued a temporary access permit which shall
16 expire when access as required under Article V becomes
17 available. A temporary access permit may be granted
18 based upon the following:

19 "A. The site is situated such that adequate access
20 cannot otherwise be provided in accord with the
21 access requirements of this Code.

22 "B. Alternate access shall not be deemed adequate and
23 connections to alternate access shall not be
24 required if the resulting route of access would
25 require a trip in excess of one block or 500 feet
26 out of direction (whichever is less)."

27 Petitioner complains that the site has frontage on NW
28 Walker Road which gives it an access meeting county code
29 requirements. Petitioner argues there are no physical
30 constraints and the temporary access granted by the county does
31 not meet the requirements of Section 409-1.4. Petitioner
32 characterizes the access problem created by the proposed

1 shopping center as self-created. Petitioner argues

2 "the County provides no explanation as to why this
3 development is uniquely entitled to an exception to
4 County policies which are designed to prevent the very
type of private arterial access which the Applicant
desires." Petition for Review at 22.

5 Respondent replies that the temporary access granted is in
6 keeping with the code. The county found that, under the code,
7 the applicant could not obtain proper access to 185th Avenue
8 because of dimensional problems, and the county appears to
9 conclude that in such cases, "a parcel cannot 'physically
10 accommodate access requirements' of the code." Record 33. The
11 county found

12 "In this case, the physical characteristic that
13 necessitates a temporary access is the length of its
[the property's] north-south dimension adjacent to
14 185th Avenue. As can be seen by reference to the site
plan, the northernmost boundary of the applicant's
15 property is located just 900 feet north of the 185th
Avenue/Walker Road intersection. Consequently, it is
16 not possible without temporary access authorization,
to meet the 1,000-foot access spacing criterion. The
17 Board concludes that the Property is situated such
that adequate access cannot otherwise be provided in
accordance with the Code's access requirements.

18 "Standard has suggested that adequate access can be
19 obtained without the temporary access approval. It
argues that the site can be served by access solely
20 from Walker Road, and that such access is required in
order to maintain the purposes of the 185th Avenue
21 environmental impact study ('EIS'). The Board does
not agree with Standard." Record 33-34.

22 The county found access solely from Walker Road not
23 adequate. The county said

24 "* * * [t]here is evidence in the record that this
25 project, when constructed, would generate
approximately 9,857 vehicle trips per day. Of these
26 trips only 40%, or approximately 3,943, are new

1 trips. Of all trips generated those travelling on
2 185th north of Walker will increase the present volumes
3 by 18%. These circumstances, assuming all trips enter
4 the public traffic system from the project only onto
5 Walker Road, create three problems:

6 "(1) The traffic movements to and from the site would
7 create intolerable service levels due to delays;

8 "(2) Approximately 472 left-turning vehicle movements
9 would be added to the 185th Avenue/Walker Road
10 intersection during the afternoon peak hour which
11 would render the level of service for that
12 intersection intolerable;

13 "(3) the greater number of turning movements during
14 peak hours both at the Walker Road access points
15 and at the intersection of 185th Avenue and
16 Walker Road will create a congested and hazardous
17 condition which can be remedied with
18 implementation of a temporary access on 185th
19 Avenue.

20 "The Board is persuaded that turning movements are the
21 traffic events that cause congestion and delay.
22 Access on Walker Road alone is not adequate in this
23 case because of the problems such limited access will
24 create. The Board is persuaded that the problems can
25 be alleviated if a temporary access is approved. The
26 alternate access suggested by Standard is neither safe
nor adequate. Based upon the above findings, the
Board concludes that approval of the temporary access
is consistent with the requirements of CDC Section
409-1.4." Record 34-35.

1 CDC Section 409-1.4 is not couched in language requiring
2 that there be a "hardship" or other circumstance unique to the
3 property before temporary access may be granted. That is,
4 Section 409-1.4 does not require a showing that the site
5 exhibits physical characteristics not typical of the area or
6 that there be some hardship unique to the property before
7 relief from the code requirement is permitted. The CDC simply
8 requires a finding that the parcel cannot "physically

1 accommodate access" consistent with code requirements.

2 Given the language in Section 409-1.4, we conclude the
3 county's interpretation of the code is correct and is not
4 contrary to the express language in the ordinance. McCoy v.
5 Linn County, 90 Or App 271, ___ P2d ___ (1988). We decline,
6 therefore, petitioner's invitation to treat this language as a
7 more traditional variance standard. We find the county's
8 decision adequately explains how the requirements of CDC
9 Section 409-1.4 are met, and we deny the second assignment of
10 error.

11 Although we deny both assignments of error, our decision in
12 Standard Insurance II requires that we reverse the decision
13 appealed in this case.

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FOOTNOTES

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Intervenor-respondent Lloyd Powell and Associates (respondent) distinguishes between the effect of reversal and remand in Standard Insurance II. We do not understand respondent to dispute that reversal in Standard Insurance II would require reversal in this case.

2

We note that our rules allow LUBA appeals to be consolidated in cases such as those presented by Standard II and this appeal, so that related cases may be considered at the same time by LUBA with all issues decided in a single opinion. OAR 661-10-055. At respondent's request we did not consolidate this appeal with the appeal in Standard II.

3

In Standard Insurance I and II we said that the county need not address the NC intent and purpose section when approving the designation for the subject property. We found other more specific criteria applicable. We are cited to nothing in the county's land use regulations making the purposes section an approval criterion for development in the NC designation.

4

The county relied upon a report by Manning Research Associates. The report states the American consumer does not develop strong loyalties to particular supermarkets, but visits different stores. Respondent denies that the county relies on recapturing 100% of the leaked dollars.

5

According to respondent, whether or not other stores are built in the area in the future is not important, the issue is whether a need is met by the proposal presently under review. We agree. The county is not obliged under CDC 202-3.4(C) to speculate about possible future development applications. The determination of whether a facility is in the public interest does not require analysis of all possible future events.

6

There is some dispute regarding the number of trips generated by the new facility. Petitioner claims a fivefold increase in traffic on 185th Avenue, but petitioner does not

1 cite to evidence in the record supporting this claim.

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3 The conditions include dedication of additional right of
4 way on N.W. 185th and on N.W. Walker Road, a waiver of
5 remonstrance against the formation of an improvement district
6 for improvements to Walker Road and 185th Avenue, establishment
7 of a reserve strip on 185th Avenue and Walker Road, certain
8 improvements including a traffic signal at the temporary access
9 site, and other conditions affecting traffic flow. Record
10 386-387.

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