

SEP 7 5 26 PM '88

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

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2
3 MAUREEN HENDERSON and)
ROBERT CLASSON,)
4)
Petitioners,) LUBA No. 88-033
5)
vs.) FINAL OPINION
6) AND ORDER
JACKSON COUNTY,)
7)
Respondent.)
8

9 Appeal from Jackson County.

10 Maureen Henderson and Robert Classon, Ashland, filed the
petition for review. Maureen Henderson argued on her own behalf.

11 Douglass H. Schmor, Medford, filed a response brief and
12 argued on behalf of intervenors-respondent. With him on the
brief were Brophy, Wilson, Duhaime, Mills, Schmor and Gerking.

13 No appearance by Jackson County.

14 BAGG, Chief Referee; HOLSTUN, Referee, participated in the
15 decision.

16 AFFIRMED 09/07/88

17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of ORS 197.850.
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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners request that we reverse or remand a Jackson
4 County land use decision denying petitioners a conditional use
5 permit.

6 MOTION TO INTERVENE

7 Intervenors move to intervene on the side of respondent in
8 this proceeding. There is no opposition, and we allow the
9 motion.

10 FACTS

11 Petitioners reside in rural Jackson County on land
12 designated in the Jackson County Land Development Ordinance as
13 farm residential (F-5). This land use designation permits
14 petitioners to keep a maximum of seven horses without
15 additional approvals. Petitioners now own and maintain seven
16 horses on their property. Petitioners requested a conditional
17 use permit to board a maximum of fifteen horses on their 6.68
18 acre parcel. This request was approved by the planning
19 department, but the approval was modified by the planning
20 commission after an appeal by a number of area residents. The
21 planning commission modified the permit to allow for a maximum
22 of ten horses (three boarded horses plus petitioners' seven).
23 The planning commission decision was appealed to the Jackson
24 County Board of Commissioners. The board of commissioners
25 overturned the planning commission decision and denied the
26 conditional use permit. This appeal followed.

1 FIRST ASSIGNMENT OF ERROR

2 "The decision of the Board of Commissioners is
3 inconsistent with the acknowledged Comprehensive Plan
and Land Use Regulations. ORS 197.835"

4 Petitioners cite the purpose statement for the F-5
5 district, which provides:

6 "The farm residential district is established in
7 conformance with the Jackson County Comprehensive Plan
8 in order to provide a buffer to Exclusive Farm Use
9 zones, and to provide areas where second income type
agricultural uses can continue to operate as free as
possible from conflicting urban uses and influences on
smaller parcels.***" Jackson County Land Development
Ordinance (LDO) Sec. 220.10.

10 Petitioners argue their property and their proposed conditional
11 use provide precisely the kind of "hobby" farm operation
12 contemplated by the above quoted portion of the ordinance.
13 Petitioners quote extensively from a report prepared by the
14 county planning staff to the effect that the conditional use
15 requested would not create adverse impacts on adjoining
16 properties and would be consistent with the purpose of the F-5
17 zone.

18 Intervenor-respondent (respondents) argue that the county
19 comprehensive plan clearly provides for a case-by-case analysis
20 of zoning decisions involving agricultural uses.¹

21 Respondents argue the county's finding that there would be
22 adverse traffic impacts as a result of this proposed
23 conditional use permit is a sufficient ground for the county to
24 deny the request.²

25 Respondents also cite a section in the LDO which provides
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1 that the design and operating characteristics of a conditional
2 use must have

3 "minimal adverse impact on the livability, value or
4 appropriate development of abutting properties in the
surrounding area." LDO Sec. 260.040(2).

5 The county found there would be more than minimal adverse
6 impact on the surrounding area. This finding justified denial
7 of the permit, according to respondents.

8 We agree with respondents that the Jackson County
9 Comprehensive Plan and LDO require the county to consider the
10 impacts of the proposed conditional use or a case-by-case
11 basis. LDO Sec. 260.040(2) specifically requires as a
12 condition of approval that there only be "minimal adverse
13 impact."³ There is nothing in the Jackson County
14 Comprehensive Plan or LDO Sec. 220.10 requiring the county to
15 grant a conditional use permit because the proposed use is
16 considered appropriate in the F-5 zone.

17 The F-5 zone lists both permitted and conditional uses.
18 LDO Secs. 220.020 and .030. The parties agree the proposed use
19 is "intensive livestock * * * production" which is a
20 conditional use. LDO Sec. 220.030(22). In addition to the
21 standard noted by respondent in LDO Sec. 260.040(2),
22 conditional uses are subject to other approval standards in LDO
23 Sec. 260, including a requirement that the conditional use
24 comply with applicable comprehensive plan requirements. LDO
25 Sec. 260.040(1). The fact the use proposed may, as a general
26 proposition, be consistent with the purposes of the F-5 zone,

1 says nothing about whether petitioner's proposal complies with
2 specific approval standards imposed by the plan and land
3 development ordinance.

4 The first assignment of error is denied.

5 SECOND ASSIGNMENT OF ERROR

6 "The Board of Commissioners made a decision not
7 supported by substantial evidence in the whole
8 record. ORS 197.835(8)(C)."

8 Petitioners argue the county failed to consider evidence
9 showing that the proposed conditional use meets all plan and
10 ordinance requirements. Further, petitioners argue the county
11 commissioners accepted incorrect evidence about the potential
12 for increased automobile and truck traffic, danger of disease
13 and number of horses to be boarded. Petitioners say the
14 evidence shows only three animals would be boarded, and the
15 remaining seven will belong to petitioners. Petitioners say
16 they have no intention of giving up any of their seven horses
17 in order to board more than three horses belonging to others.
18 Further, petitioners claim that concerns about traffic and
19 veterinary expenses are completely unwarranted. Petitioners
20 argue the feed requirements and other visits necessary to
21 maintain the animals will not increase or will not increase
22 appreciably. Petitioners note that the owners of the horses to
23 be boarded are in Alaska, and concerns about frequent visits
24 from horse owners are therefore without foundation.

25 Respondents reply that the roadway leading to petitioners'
26 property is narrow and only part of the roadway is maintained

1 by the county. Additional traffic generated by the use will
2 result in a negative impact causing additional maintenance
3 expense to road users, according to respondents. Testimony
4 from the Jackson County Public Works Department supports
5 respondents' arguments about added road maintenance expense.
6 Record 248, 289. There is testimony in the record from an
7 agricultural extension agent stating additional expense will be
8 incurred to neighboring horse owners because of increased
9 veterinary costs. Record 25. There also is a letter in the
10 record from a veterinarian recommending increased vaccination
11 for particular veterinary problems and estimating an initial
12 cost of \$35.00 per horse and \$60.00 annual costs per horse to
13 provide protection against respiratory diseases. Record 259.
14 The letter is not directed at this property, but refers to any
15 time horses with unknown health and vaccination backgrounds are
16 introduced to neighboring property also housing horses.

17 Respondents add that the conditional use permit does not
18 require the petitioners to maintain any particular ratio of
19 boarded horses to horses of their own. Petitioners would be
20 allowed, under the permit, to board a total of ten horses for
21 paying customers who might visit the horses on a regular basis.

22 Additional traffic could be expected to result if three
23 additional horses were boarded. The permit requested did not
24 limit the applicant to three boarded horses in addition to
25 seven horses owned by the applicant. Once granted the permit,
26 the applicant could exercise all rights extended by conditional

1 use permit. In other words, the permittee could utilize the
2 permit and board ten horses owned by others, provided other
3 arrangements were made for the horses now owned by the
4 permittee. The county is obliged to consider this fact when
5 evaluating the impacts of the proposed conditionl use permit.

6 It may be true that the minimal increase presently
7 contemplated by the applicant would not have more than a
8 minimal adverse impact on surrounding properties. However, as
9 explained above, the county must consider the effect of the
10 rights granted by the conditional use permit, not the immediate
11 plans of the applicant. Our review, then, is to consider the
12 adequacy of the evidence supporting the county's decision to
13 deny the requested conditional use permit, not the adequacy of
14 the evidence to support a conditional use permit limited to the
15 applicant's current plan for boarding seven owned horses and
16 only three horses owned by others. We agree with respondents
17 that there is substantial evidence to support the county's
18 conclusion that the permit requested could result in increased
19 traffic and have more than minimal adverse impacts on
20 surrounding properties.

21 Substantial evidence is evidence which a reasonable person
22 would accept as being sufficient to support the decision. Our
23 review for substantial evidence requires consideration not only
24 of the evidence supporting the decision, but also review of the
25 evidence which fairly detracts from the weight of the
26 supporting evidence. Younger v. City of Portland, 305 Or 346,

1 752 P2d 262 (1988). In this case, we find the evidence offered
2 by petitioners does not undermine that relied upon by the
3 county. The evidence petitioners relied on to support the
4 requested permit largely assumes continuation of petitioner's
5 current practices and does not respond to evidence of impacts
6 that may result if the rights granted under the permit are
7 exercised fully.

8 The second assignment of error is denied.

9 THIRD ASSIGNMENT OF ERROR

10 "The Board of Commissioners did not make a finding
11 pursuant to Chapter 285.020(10), Jackson County LDO."

12 Petitioners cite LDO Sec. 285.010 which provides:

13 "If the appellate body elects to overturn or modify
14 the previous decision it shall make a finding
15 declaring one or more of the following:

16 "A) That the Planning Commission, * * * did not
17 correctly interpret the requirement of this ordinance,
18 the Comprehensive Plan, or other requirements of law.

19 "B) That the Planning Commission * * * did not
20 consider all of the information in the existing record
21 which was pertinent to the case."

22 Petitioners claim the board of county commissioners did not
23 make these required findings but instead simply found the
24 planning commission did not have certain evidence available to
25 it about traffic impact. Petitioners claim this was error.
26 Petitioners also argue the new testimony regarding traffic
impacts was received improperly because the county board is
required to decide matters on the record, without the benefit
of any new testimony. LDO Sec. 285.020(6) provides:

1 ". . . Within seven days after the filing of a notice
2 of appeal, the appellant shall file with the
3 Department a detailed written statement of grounds for
4 the appeal explaining:

5 "A) How the County incorrectly interpreted this
6 ordinance, the Comprehensive Plan, or other
7 requirements of law; or

8 "B) What information in the record which was
9 pertinent to the decision was not considered."

10 "The burden of proof on an appeal rests with the
11 appellant. If the written statement is not provided,
12 the appellate body may affirm the lower decision
13 summarily."

14 Respondents reply that any error committed was not
15 prejudicial to petitioners' interests. Petitioners were
16 present at the county commissioner's hearing, and there is no
17 indication that petitioners were prevented from rebutting any
18 new evidence introduced at that time. Without a showing of
19 prejudice, petitioners may not obtain reversal from this
20 Board. See ORS 197.835(8)(a)(B); Astoria Thunderbird v. City
21 of Astoria, 13 Or LUBA 154 (1985).

22 We agree with petitioners that the county failed to make
23 the finding required by LDO Sec. 285.020(6). The county order
24 states that the planning commission did not have information
25 before it on traffic and the number of persons who might visit
26 the applicant's property. These statements are not equivalent
to a finding that the planning commission did not interpret the
ordinance correctly or that information in the record was not
considered.

However, we view the county's error as a procedural error.

1 That is, the county did not correctly follow the dictates of
2 its ordinance. In such cases, we may only reverse or remand
3 the decision where a petitioner is able to show prejudice as a
4 result of a procedural error. ORS 197.835(8)(a)(B).
5 Petitioners do not show why this error prejudices petitioners'
6 substantial rights. Without such a showing, we may not
7 overturn the county's order.

8 We do not believe petitioners are prejudiced by the
9 county's apparent error in accepting additional testimony. We
10 agree with petitioners' interpretation of the ordinance that
11 the county is not to take additional evidence but is to rely on
12 the record produced by the lower body. The county did not do
13 so in this case. However, petitioners were present at the
14 proceeding, and there is no indication that petitioners were
15 precluded from replying to the new evidence or, indeed,
16 offering additional evidence of their own. Under such
17 circumstances, we do not find prejudice and therefore are not
18 empowered to overturn or remand the decision for this
19 procedural error. See Smith v. Douglas County, ___ Or LUBA ___
20 (LUBA No. 88-016, June 15, 1988) slip op at 10-11.

21 The third assignment of error is denied.

22 The decision of Jackson County is affirmed.

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FOOTNOTES

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4 The agricultural lands element of the plan provides, in
part:

5 "* * * due to the diversity of agricultural
6 activities, it is extremely difficult to develop
7 agricultural zoning based on a predominate farm size
8 or farm type. In order to be effective farm use
9 zoning must consider the wide range of agricultural
10 activities in an equal manner. The only feasible way
11 to accomplish this is to develop a zone which meets
12 state and local requirements and treats each farming
13 area based on its own unique characteristics through
14 review of land use proposals on a case by case basis.
15 * * *" Jackson County Comprehensive Plan, p. 92.

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17 Respondents cite policies and implementation strategies
18 contained in the comprehensive plan's transportation
19 element. Respondents argue these policies and strategies
20 require the county to consider traffic impacts, and the
21 county's decision to deny its conditional use permit was
22 based in part on traffic concerns.

23 3
24 It is not clear from petitioners' argument under the
25 first assignment of error whether petitioners also
26 challenge the county's evidentiary support for finding LDO
27 Sec. 260.040(2) was violated by the request. We address
28 petitioners' substantial evidence challenges under the
29 second assignment of error.