

1                               BEFORE THE LAND USE BOARD OF APPEALS  
2                               OF THE STATE OF OREGON  
3

4 JACK LEE REYNOLDS,                               )  
5    )  
6                               Petitioner,                               )  
7    )  
8                               vs.    )  
9    )  
10 CLACKAMAS COUNTY,                               )  
11    )  
12                               Respondent.                               )  
13

LUBA No. 91-037

FINAL OPINION  
AND ORDER

14  
15               Appeal from Clackamas County.

16  
17               Bruce M. Howlett, Portland, filed the petition for  
18 review and argued on behalf of petitioner.

19  
20               Michael E. Judd, Oregon City, filed the response brief  
21 and argued on behalf of respondent.

22  
23               SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,  
24 Referee, participated in the decision.

25  
26                       REMANDED   07/30/91

27  
28               You are entitled to judicial review of this Order.  
29 Judicial review is governed by the provisions of ORS  
30 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

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

5 **FACTS**

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

20 All property on the subject block is zoned R-7. The  
21 Clackamas County Zoning and Development Ordinance (ZDO)  
22 lists "service recreational uses" as a conditional use in  
23 the R-7 zone. ZDO 301.05.A.12. Service recreational uses  
24 include lodges and fraternal organizations. ZDO 813.01.A.  
25 The county approved the proposed parking lot as an accessory  
26 use to a service recreational use. Record 2.

1           Petitioner owns and resides on the lot adjoining the  
2 subject lot to the west.       Petitioner's property is  
3 contiguous to the VFW Post building to the north.   The area  
4 south of petitioner's property, across S.E. Alberta Avenue,  
5 is zoned for light industrial use.   To the west of  
6 petitioner's property is another parking area serving the  
7 VFW Post building.<sup>1</sup>

8           On March 13, 1991, after a public hearing, the county  
9 hearings officer issued the challenged decision approving  
10 the proposed parking area as a conditional use.   The  
11 conditions of approval include the following:

12           "Design Review of the parking area is required.  
13           This review shall insure adequate buffering of the  
14           westerly property line, with a combination of  
15           landscaping and fencing.   \* \* \*

16           "The owner of Tax Lot 5500 [petitioner] shall be  
17           given notice and an opportunity to participate in  
18           all Design Review proceedings.

19           "\* \* \* \* \*"   Record 4.

20           **ASSIGNMENT OF ERROR**

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

23           **A.    Neighborhood Association Recommendation**

24           Petitioner contends the decision incorrectly states the  
25 recommendation of the local neighborhood association was to

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<sup>1</sup>On September 17, 1990, in a separate proceeding, this parking area and an addition to the existing VFW Post building received conditional use approval from the county.   Record 47-51.

1 approve the conditional use, subject only to a condition  
2 requiring fencing between the subject property and  
3 petitioner's property. Record 1. Petitioner argues the  
4 neighborhood association's recommendation of approval was  
5 also conditioned on looking into whether the area should be  
6 rezoned for commercial or light industrial use. Record 53.  
7 According to petitioner, because the hearings officer did  
8 not have the authority to consider the rezoning question, he  
9 should not have concluded the neighborhood association  
10 approved the conditional use.

11 The county responds that the hearings officer correctly  
12 characterized the neighborhood association's position. The  
13 county maintains the neighborhood association simply added a  
14 suggestion that rezoning of the area be considered in the  
15 future, but did not condition its recommendation of approval  
16 on such rezoning. The county also argues the hearings  
17 officer is not bound to follow the neighborhood  
18 association's recommendation and, in fact, did not rely on  
19 the recommendation in his decision. Therefore, according to  
20 the county, even if the hearings officer did mischaracterize  
21 the neighborhood association's recommendation, this provides  
22 no basis for reversal or remand.

23 We agree with the county's interpretation of the  
24 neighborhood association's recommendation. We also agree  
25 with the county that even if the findings describe the  
26 recommendation incorrectly, such mistake does not provide a

1 basis for reversal or remand because there is no indication  
2 in the decision that the hearings officer relied on the  
3 recommendation in determining compliance with applicable  
4 approval criteria. See Kieval v. City of Ashland, 17  
5 Or LUBA 571, 575 (1989) (incorrect finding is harmless error  
6 where no approval criterion is shown to be violated).

7 This subassignment of error is denied.

8 **B. ZDO 1203.01.D**

9 ZDO 1203.01.D establishes the following criterion for  
10 approval of a conditional use:

11 "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 uses  
15 listed in the underlying districts."

16 The county decision states:

17 "\* \* \* The general area will be benefitted by  
18 this additional parking, which will reduce any  
19 need for off-site parking to serve patrons of the  
20 VFW Post. The only property which may be  
21 adversely impacted is [petitioner's] residence  
22 adjacent on the west. This property will be  
23 surrounded by the applicant's facility and parking  
24 on three sides, and by SE Alberta Avenue on the  
25 other side. Negative impacts from the proposed  
26 parking area will include loss of privacy, visual  
27 impacts and noise impacts. In the judgment of the  
28 Hearings Officer, conditions of approval will  
29 mitigate these impacts to the extent that they  
30 will not substantially limit or impair the use of  
31 [petitioner's] adjacent property \* \* \* for the  
32 residential purposes of the R-7 zoning district.  
33 Design review is required to approve landscaping  
34 and fencing sufficient to mitigate visual and  
35 privacy impacts. All new parking areas will be  
36 hard surfaced to reduce noise and dust."  
37 Record 3.

1           Petitioner argues the county's determination of  
2 compliance with ZDO 1203.01.D is not supported by  
3 substantial evidence in the record. Petitioner points out  
4 that residential use is a primary use in the R-7 zone, and  
5 that the effect of the challenged decision is that his  
6 dwelling will be bordered on three sides by the VFW Post and  
7 its parking lots. Petitioner cites evidence in the record  
8 concerning impacts on his property, including trespass by  
9 intoxicated patrons' automobiles, noise from automobile  
10 engines and glare from headlights, due to the existing VFW  
11 Post and parking lots. Record 27-30, 55, 56. Petitioner  
12 further argues the above quoted findings concede the  
13 proposed use will produce additional negative impacts on  
14 petitioner's residential use of his property due to loss of  
15 privacy, visual impacts and noise. Petitioner contends the  
16 impacts of the proposed use will substantially impair  
17 residential use of his property, and cannot be mitigated by  
18 a fence and some landscaping.

19           The county points out that ZDO 1203.01.D allows  
20 approval of a conditional use so long as it does not  
21 substantially limit or impair the use of surrounding  
22 properties. While the county concedes that the addition of  
23 another parking lot on the east side of petitioner's  
24 property would have some additional impact on the use of  
25 petitioner's residence, the county argues that the impacts  
26 would not be substantial, due to the fact that such impacts

1 are already caused by the existing VFW Post operation.  
2 According to the county, the hearings officer could  
3 reasonably decide that the proposed use would add little to  
4 the impacts that already exist and, together with the  
5 buffering to be required through the design review process,  
6 would not substantially limit or impair residential use of  
7 petitioner's property.<sup>2</sup>

8 The county's decision concedes that the proposed  
9 parking area will cause additional negative impacts on  
10 residential use of petitioner's property. The county cites  
11 no evidence in the record that (1) these impacts, added to  
12 the impacts from the existing operation, will not  
13 substantially limit or impair residential use of  
14 petitioner's property, or (2) required mitigation measures  
15 will reduce the additional impacts to the point that  
16 residential use of petitioner's property is not  
17 substantially impaired.<sup>3</sup>

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<sup>2</sup>The county also argues in its brief that ZDO 1203.01.D is concerned with "the character of the surrounding area" and, therefore, can be satisfied if the proposed use causes overall benefits to the surrounding area and relatively minor negative impacts on petitioner's property. The county cites its finding that "the general area will be benefitted by this additional parking, which will reduce any need for off-site parking to serve patrons of the VFW Post." Record 3. However, the county conceded at oral argument that there is no evidence in the record of an off-street parking problem in the area and, therefore, we conclude the county's determination that the general area will be benefitted by the proposed use is not supported by substantial evidence.

<sup>3</sup>The only evidence in the record cited by the county is a statement by the applicant's representative that in the last 15 years, sheriff's officers have not been called to the property due to the VFW Post's operations. Record 36. This statement neither supports a conclusion that

1           Substantial evidence is evidence a reasonable person  
2 would rely on in reaching a decision. City of Portland v.  
3 Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475  
4 (1984); Braidwood v. City of Portland, 24 Or App 477, 480,  
5 546 P2d 777 (1976). We conclude, based on a review of the  
6 evidence cited, that a reasonable person would not have  
7 concluded that the proposed use will not substantially limit  
8 or impair residential use of petitioner's property.  
9 Therefore, the county's determination that the proposed use  
10 complies with ZDO 1203.01.D is not supported by substantial  
11 evidence in the record.

12           This subassignment of error is sustained.

13           **C.    ZDO 1203.01.E**

14           ZDO 1203.01.E establishes the following criterion for  
15 approval of a conditional use:

16           "The proposal satisfies the goals and policies of  
17 the Comprehensive Plan which apply to the proposed  
18 use."

19           Petitioner argues that the challenged decision fails to  
20 satisfy the goals and policies of the county's comprehensive  
21 plan and the ZDO because the hearings officer did not  
22 consider the financial impact of the proposed use on  
23 petitioner. Petitioner argues that surrounding his home  
24 with parking lots will have a negative impact on the value

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the proposed use will not substantially limit or impair residential use of  
petitioner's property nor undermines the evidence in the record cited by  
petitioner that the existing VFW Post operation causes adverse impacts on  
residential use of his property.

1 of his property.

2           Petitioner fails to identify any provision of the  
3 comprehensive plan goals and policies which requires the  
4 county to consider financial impacts on neighboring property  
5 owners when approving a conditional use. Without a showing  
6 that an applicable approval criterion has been violated, we  
7 cannot grant relief. 19th Street Project v. City of The  
8 Dalles, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-053, February 11,  
9 1991), slip op 14; Lane County School Dist. 71 v. Lane  
10 County, 15 Or LUBA 150, 153 (1986).

11           This subassignment of error is denied.

12           The assignment of error is sustained, in part.

13           The county's decision is remanded.