

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

4 ARTHEL LUNDY and GREGORY MOODY,)
5))
6 Petitioners,)
7))
8 vs.)
9))
10 CLACKAMAS COUNTY,)
11))
12 Respondent.)
13

LUBA No. 95-156

FINAL OPINION
AND ORDER

14
15 Appeal from Clackamas County.
16

17 Arthel Lundy and Gregory Moody, Eagle Creek, filed the
18 petition for review and argued on their own behalf.
19

20 Michael E. Judd, Chief Assistant County Counsel, Oregon
21 City, filed the response brief and argued on behalf of
22 respondent.
23

24 GUSTAFSON, Referee; LIVINGSTON, Chief Referee,
25 participated in the decision.
26

27 AFFIRMED 02/12/96
28

29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's denial of petitioner
4 Lundy's request for a temporary special care permit.

5 **FACTS**

6 Petitioner Lundy (Lundy) owns and resides in a mobile
7 home on an approximately six-acre parcel in the county's
8 Rural Residential Farm Forest 5 Acre (RRFF-5) District.
9 Lundy suffers from narcolepsy, a medical condition which
10 significantly limits her functional abilities. Lundy
11 applied to the county for a temporary, special care permit
12 for placement of a second mobile-home dwelling on her
13 property, in order to allow her son, petitioner Moody
14 (Moody), and his family to temporarily reside on her
15 property.

16 The county planning division administratively approved
17 Lundy's application. Neighboring property owners appealed
18 the administrative approval to the county hearings officer
19 who, after a public hearing, reversed the planning division
20 determination and denied petitioners' application on the
21 basis that alternative housing exists nearby.

22 Petitioners appeal the hearings officer's decision.

23 **ASSIGNMENT OF ERROR**

24 Petitioners contend, in essence, that the county's
25 decision is not based on substantial evidence. Petitioners
26 take particular exception to what they understand as the

1 hearings officer's rejection of Lundy's claim of
2 debilitating health. They submitted substantial evidence
3 below and substantial argument here to establish the
4 severity of Lundy's medical condition and the extreme
5 limitations on her functional abilities. Petitioners urge
6 that Lundy's medical condition requires that Moody and his
7 family reside on her property.

8 The hearings officer evaluated Lundy's request pursuant
9 to the county's land development ordinance (LDO) 1204.03,
10 which states:

11 SPECIAL CARE: The Planning Director may approve a
12 temporary permit * * * for a period of up to three
13 (3) years, for the use of a mobile home or trailer
14 house as a residence for the care of a person who
15 requires special attention because of age or poor
16 health, provided that the applicant provides
17 evidence substantiating the following * * *:

18 A. There exists a need for special attention (a
19 doctor's statement establishing this need is
20 appropriate and suggested evidence); and

21 B. There exists no reasonable housing
22 alternative, such as nearby rental housing or
23 adequate housing on the subject property."

24 The hearings officer determined Lundy satisfies LDO
25 1204.03(A): her medical condition requires special
26 attention. However, the hearings officer determined LDO
27 1204.03(B) is not satisfied because alternative housing
28 exists in the nearby area. The sole issue here is whether
29 there is substantial evidence in the record to support the
30 hearings officer's conclusion that reasonable housing

1 alternatives exist, which could provide residence for an
2 individual to attend to Lundy's needs.

3 As a review body, we are authorized to reverse or
4 remand the challenged decision if it is "not supported by
5 substantial evidence in the whole record."
6 ORS 197.835(7)(a)(C). Substantial evidence is evidence a
7 reasonable person would rely on in reaching a decision.
8 City of Portland v. Bureau of Labor and Ind., 298 Or 104,
9 119, 690 P2d 475 (1984); Bay v. State Board of Education,
10 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes
11 County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In
12 reviewing the evidence, however, we may not substitute our
13 judgment for that of the local decisionmaker. Rather, we
14 must consider and weigh all the evidence in the record to
15 which we are directed, and determine whether, based on that
16 evidence, the local decisionmaker's conclusion is supported
17 by substantial evidence. Younger v. City of Portland, 305
18 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon
19 v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992).
20 Moreover, since we are reviewing the hearings officer's
21 decision, we may consider only evidence that was before him,
22 and which he had the opportunity to evaluate in reaching his
23 decision. We may not consider new facts which were
24 presented to us, but were not before the hearings officer
25 when he made his decision.

26 The hearings officer's finding that petitioners failed

1 to satisfy LDO 1204.03(B) states:

2 "The applicant must establish that there exists no
3 reasonable housing alternative, such as nearby
4 rental housing or adequate housing on the subject
5 property.

6 In this case, there are reasonable housing
7 alternatives available. The physical problems
8 suffered by the applicant are not sufficient to
9 require the presence of an on-site care provider.
10 The applicant is able to drive her automobile,
11 care for herself and perform many chores and tasks
12 which do not require extensive lifting or physical
13 exertion. On a day-to-day basis, Ms. Lundy
14 appears capable of doing those things which are
15 necessary for her own maintenance. Such help as
16 she does require with the management of the
17 blueberry crop and more labor-intensive chores can
18 be provided by the son or someone else living off
19 the subject property, as has been done in the
20 past. Alternative housing close enough for this
21 level of assistance is available in the
22 communities of Sandy or Estacada, neither of which
23 are more than a few miles distant, or within the
24 community of Eagle Creek." Record 10.

25 The county has directed us to evidence in the record to
26 substantiate this finding. In particular, the county has
27 cited to testimony that alternative housing is available
28 near Lundy's property in Eagle Creek, as well as in the
29 nearby communities of Estacada and Sandy. We are cited to
30 nothing, and our search of the record reveals no testimony
31 or evidence, to refute this evidence, with the exception of
32 one statement that a specific property listed for sale
33 immediately adjacent to Lundy's residence was unacceptable
34 and unaffordable to Moody.

35 At oral argument, petitioners argued that alternative

1 housing in Eagle Creek was unacceptable, and presented a
2 copy of a newspaper classified advertisement which
3 petitioners contend evidences the lack of alternative
4 housing in Eagle Creek. This argument and evidence,
5 however, was not presented to the hearings officer, and,
6 therefore, we cannot evaluate it in determining whether the
7 hearings officer's decision is supported by substantial
8 evidence. Moreover, even if we could consider this
9 evidence, it does not undermine the hearings officer's
10 conclusion. Petitioners presented no evidence to the
11 hearings officer that alternative housing in Sandy or
12 Estacada is not available.

13 There is substantial evidence in the record to support
14 the hearings officer's finding that alternative housing is
15 available.

16 Petitioners' assignment of error is denied.

17 The county's decision is affirmed.

18