

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4           MICHAEL CANFIELD and SUSAN            )

5           CANFIELD,                                    )

6    )

7                    Petitioners,                    )

8    )

9                    vs.                                    )

10    )           LUBA No. 95-152

11           YAMHILL COUNTY,                            )

12    )           FINAL OPINION

13                    Respondent,                    )

14    )           AND ORDER

15    )

16                    and                                    )

17           TROY RECH and ALLISON LARIDON,        )

18    )

19                    Intervenors-Respondent.                                    )

20  
21  
22           On remand from the Court of Appeals.

23  
24           John Bridges, Newberg, represented petitioners.

25  
26           John Pinkstaff, Assistant County Counsel, McMinnville,  
27 represented respondent.

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29           Elliott C. Cummins, McMinnville, represented  
30 intervenors-respondent.

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32           GUSTAFSON, Referee; HANNA, Chief Referee; LIVINGSTON,  
33 Referee, participated in the decision.

34  
35                    REMANDED                                    10/30/96

36  
37           You are entitled to judicial review of this Order.  
38 Judicial review is governed by the provisions of ORS  
39 197.850.

1 Opinion by Gustafson.

2 **INTRODUCTION**

3 This appeal is before us on remand from the court of  
4 appeals. Canfield v. Yamhill County, 142 Or App 12 (1996).

5 In Canfield v. Yamhill County, \_\_\_ Or LUBA \_\_\_ (LUBA  
6 No. 95-152, March 13, 1996) (Canfield I), we denied  
7 petitioners' substantial evidence challenge against the  
8 county's determination that the "proposed use is  
9 appropriate, considering the adequacy of the public  
10 facilities and services existing or planned for the area  
11 affected" as required by Yamhill County Zoning Ordinance  
12 (YCZO) 1202.02(E). Petitioners argued there was not  
13 substantial evidence to support a finding that traffic  
14 impacts of the proposed dog kennel complied with YCZO  
15 1202.02(E). We found:

16 "[W]hile petitioners assert there is evidence in  
17 the record that conflicts with the county's  
18 findings, petitioners refer us to no evidence in  
19 the record that either refutes or undermines the  
20 evidence upon which the county based its  
21 conclusion. Without references to evidence in the  
22 record which so undermines the evidence upon which  
23 the county based its conclusion as to compel a  
24 conclusion that a reasonable person could not have  
25 reached the county's conclusion, we cannot find  
26 that the county's findings lack substantial  
27 evidence." Canfield I, slip op 15.

28 On appeal to the Court of Appeals, petitioners argued  
29 (1) they did cite to evidence that detracted from the  
30 evidence upon which the county relied; and (2) there was no  
31 evidence in the record to support the county's conclusion

1 that the criterion was satisfied. The Court of Appeals  
2 rejected petitioners' first argument, but found that this  
3 Board had not adequately evaluated the second, finding that:

4 "[U]nlike the situation where a party argues that  
5 the evidence that supports a finding is overcome  
6 by or is insubstantial when viewed with detracting  
7 evidence that can be identified and located in the  
8 record, no identification of evidence in the  
9 record is possible or necessary for a party to  
10 obtain review by LUBA of a contention that there  
11 is no evidence that supports the finding."  
12 (Emphasis in original.) 142 Or App at 17.

13 Thus, the Court of Appeals concluded that petitioners were  
14 "entitled to have the merits of [their] 'no evidence'  
15 argument considered and decided, to the extent that argument  
16 can stand independently of any unreviewable matter in the  
17 other." Id. at 18. Accordingly, the Court of Appeals  
18 remanded the decision to this Board for reconsideration of  
19 petitioners' allegation that there was no evidence in the  
20 record to support the county's finding. Based on the Court  
21 of Appeals' directive, we now consider only whether there is  
22 any evidence in the record to support the county's finding.

23 **DISCUSSION**

24 YCZO 1202.02(E) requires that the applicant establish:

25 "The proposed use is appropriate, considering the  
26 adequacy of the public facilities and services  
27 existing or planned for the area affected[.]"

28 Petitioners contend essentially that there is no  
29 evidence in the record to support the county's conclusion  
30 that the adjacent highway is adequate to accommodate the

1 traffic impacts from the proposed kennel. Without citation  
2 to the record, petitioners make numerous arguments that  
3 Highway 99W, which fronts the subject property, is already  
4 heavily traveled and overburdened, which causes it to be  
5 difficult or hazardous to access. Petitioners contend  
6 "[t]he applicants provided no evidence that suggested that  
7 the roadway was capable of handling this impact. They  
8 merely expressed a belief that the roadway could handle a  
9 few more vehicles \* \* \*." Petition for Review 25.

10 The county determined that the public facilities,  
11 including Highway 99W, were adequate for the proposed  
12 kennel. The county and intervenors point to evidence in the  
13 record to substantiate the county's conclusion. That  
14 evidence includes comments from the Oregon Department of  
15 Transportation (ODOT), which has jurisdiction over Highway  
16 99W. ODOT will require intervenors to obtain a new approach  
17 road permit, and improve the access to the highway to  
18 current standards.<sup>1</sup> ODOT will require a Transportation Site

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<sup>1</sup>The Conditions of approval imposed by the county require, in part:

\* \* \* \* \*

- "5. A new approach road permit shall be obtained from the Oregon Department of Transportation (ODOT), and the access shall be improved to their standards. The access shall be wide enough to allow cars to enter and exit the property at the same time. A clear-vision area shall be maintained at the intersection of the access drive and Highway 99W.
- "6. A directional sign shall be posted near the intersection of the driveways serving the parcel to the south and the

1 Review before an approach permit will be granted. As  
2 intervenors note in the record, since ODOT has jurisdiction  
3 over the highway, it is within ODOT's authority to evaluate  
4 both the highway usage and intervenors' access to it. A  
5 video tape in the record also illustrates the current access  
6 from the site to the highway, and the current level of  
7 traffic on Highway 99W.

8 There is also evidence in the record that the current  
9 daily traffic count on Highway 99W is approximately 18,000.  
10 Petitioners contend that the proposed kennel will add  
11 approximately 65 cars to that number. Intervenors do not  
12 state an exact number of anticipated cars daily, but  
13 estimate the total would be closer to 100 per week at full  
14 capacity. They note that since "people usually leave dogs  
15 for a weekend or a week; not on a daily basis, the kennel  
16 would probably never have a total of 65 people all in one  
17 day." Record 21. However, even using petitioners' figures,  
18 there is evidence in the record upon which the county could  
19 find that, with the conditions it imposed, Highway 99W is  
20 adequate to accommodate the proposed kennel.

21 Because there is evidence in the record to support the  
22 county's decision, we reject petitioners' contention that  
23 there is no evidence in the record to support the decision.  
24 We, therefore, adhere to our decision in Canfield I.

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subject parcel, in order to guide traffic to the  
appropriate driveway. \* \* \* Record 4.

1           As set forth in Canfield I, the county's decision is  
2 remanded.