

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS NOV 24 10 33 AM '80  
OF THE STATE OF OREGON

3	JIM SIMS,	)	
4		)	
	Petitioner,	)	
5		)	LUBA No. 80-086
	v.	)	
6	TILLAMOOK COUNTY,	)	FINAL OPINION
		)	AND ORDER
7	Respondent.	)	

9 Appeal from Tillamook County.

10 M. Chapin Milbank, Salem, filed the Petition for Review and  
11 argued the cause for Petitioner Sims. With him on the brief  
were Schlegel, Milbank, Wheeler, Jarman & Hilgemann.

12 Warren A. McMinimee, Tillamook, filed the brief and argued  
13 the cause for Respondent Tillamook County.

14 Elizabeth S. Merrill, Tillamook, filed the brief and argued  
the cause for Intervenor-Respondents, Coon, Cornett and Zuidema.

15 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;  
16 participated in this decision.

17 REVERSED and REMANDED 11/24/80

18  
19 You are entitled to judicial review of this Order.  
20 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioner appeals Respondent's denial of his request for a  
4 permit to build a 1300 lineal foot, 15 foot wide rock surface  
5 road across his land. A development permit is required by the  
6 Flood Hazard Zone Ordinance enacted by Tillamook County in June  
7 of 1978.

8 ASSIGNMENTS OF ERROR

9 Petitioner sets forth three assignments of error. The  
10 first assignment of error is that the county's denial was not  
11 based on the standards and criteria set forth in the applicable  
12 zoning ordinance. The second assignment of error alleges that  
13 the findings are inadequate because they fail to set out the  
14 criteria required to be met, and no findings were made  
15 addressing the criteria. The final assignment of error is that  
16 the decision was not supported by substantial evidence in the  
17 record.

18 STATEMENT OF FACTS

19 Petitioner seeks to construct a rock surface road over his  
20 property which would connect with a county road, Makinster  
21 Road. Petitioner's private road would be approximately 1300  
22 feet in length, 15 feet in width and would require fill  
23 averaging approximately 8 inches in depth. The road would be  
24 constructed over 4 tax lots owned by petitioner.<sup>1</sup>

25 The property owned by petitioner over which the road would  
26 be built lies between Makinster Road and the Wilson River.

1 Petitioner initially began constructing the road in February of  
2 1980, but was advised in writing by the Tillamook County  
3 Planning Director that construction of the road was taking  
4 place within the 100 year flood plane of the Wilson River and  
5 that construction of the road would, therefore, be subject to  
6 the Tillamook County Flood Hazard Zone Ordinance. The letter  
7 stated as follows:

8 "The section of this ordinance and the zoning  
9 ordinance which could apply to your property include  
the following:

10 "(4) In all areas of special flood hazards where  
11 a floodway has not been indentified, the following  
standards shall apply:

12 "(a) No structure, fill, deposit, storage  
13 of material or other use may be allowed which,  
14 acting alone or when combined with all other  
15 existing and proposed development materially  
affects the capacity to discharge flood water or  
causes the diversion of flood water to areas not  
previously subject to these diversions.

16 "(9) (a) A development permit shall be  
17 obtained before any construction or development  
18 within any area of special flood hazard  
19 established in section 2.030(2). The permit  
20 shall be for all structures including mobile  
homes, as set forth in the definitions, and for  
all other development including fill and other  
activities, also as set forth in the definitions."

21 Petitioner obtained the services of a registered  
22 professional engineer to examine the proposed road to determine  
23 its impact on flooding. The engineer's report stated that  
24 about 600 feet of the road was below flood plane and about 800  
25 feet was above flood plane. He addressed the specific question  
26 of whether the fill material used for the road would have any

1 impact on the flood plane elevation. His conclusion was that  
2 the net increase in the flood plane elevation would be about  
3 .02 feet "when taking into account the unbuildable areas." He  
4 also stated that the location of fill was perhaps more  
5 important than the quantity of fill in assessing the impact  
6 fill would have on flood elevations. Given the distance of the  
7 road fill from the Wilson River (200 feet minimum) he concluded  
8 that the fill would not act as a levy to contain flood waters  
9 and thereby affect adjacent properties. He stated that "some  
10 shallow ponding can be expected immediately adjacent to the  
11 road" but that "the only area that could possibly be affected  
12 is that area between the river bank and the road."

13 Based upon the report of petitioner's engineer as well as  
14 petitioner's consent to the placement of a deed restriction on  
15 any parcel sold by petitioner restricting diking, the planning  
16 director issued the permit to allow construction of the road.

17 The planning director's issuance of the permit was appealed  
18 to the planning commission. The planning commission overruled  
19 the planning director and denied the permit. Petitioner  
20 appealed this decision to the board of county commissioners  
21 which upheld the decision of the planning commission. This  
22 appeal followed.

23 OPINION

24 ORS 215.416 provides, in pertinent part, as follows:

25 "(5) Approval or denial of a permit application  
26 shall be based on standards and criteria which shall  
be set forth in the zoning ordinance or other

1 appropriate ordinance or regulation of the county and  
2 which shall relate approval or denial of a permit  
3 application to the zoning ordinance and comprehensive  
4 plan for the area in which the proposed use of land  
would occur and to the zoning ordinance and  
comprehensive plan for the county as a whole.

5 "(6) Approval or denial of a permit shall be  
6 based upon and accompanied by a brief statement that  
7 explains the criteria and standards considered  
8 relevant to the decision, states the facts relied upon  
in rendering the decision and explains the  
justification for the decision based on the criteria,  
standards and facts set forth."

9 The above provisions essentially require that an approval or  
10 denial of a permit application be based upon findings of fact  
11 which explain the criteria used in making the decision, the  
12 facts found by the county that relate to those criteria, and  
13 the conclusions drawn by the county from those facts. The  
14 criteria used by the county must be found in the county's  
15 zoning ordinance and comprehensive plan.

16 The county's findings in this case are fatally defective  
17 because they fail to meet the above requirements. The county's  
18 findings are as follows:

19 "1. On February 27, 1980, Paul Benson wrote a  
20 letter to Charles E. Curl, informing him that under  
21 the Tillamook County Zoning Ordinance Flood Hazard  
22 Section a development permit would be required for the  
private road being installed off of MaKinster (sic)  
Road because it was located in a flood hazard zone.

23 "2. Appellant, James Sims, and Charles E. Curl,  
24 jointly requested a development (sic) permit for the  
25 private road installation on Tax Lots 1901, 1903,  
1904, and 1905 of Section 13D, Township 1 South, Range  
10 West of the Willamette Meridian on March 3, 1980.

26 "3. Paul Benson, interim planning director,  
issued the development permit requested by appellant

1 on March 18, 1980.

2 "4. On March 24, 1980, the Tillamook Citizens  
3 for Responsible Development appealed Paul Benson's  
4 granting of the said development permit to the  
5 Tillamook County Planning Commission.

6 "5. The Tillamook County Planning Commission  
7 reversed Paul Benson's granting of said development  
8 permit and on April 24, 1980, unanimously denied the  
9 said development permit.

10 "6. Pursuant to Section 3.090 (11)(c) of the  
11 Tillamook County Zoning Ordinance the appellant James  
12 Sims, appealed said decision of the Tillamook County  
13 Planning Commission to the Board of County  
14 Commissioners for Tillamook County on April 28, 1980.

15 "7. Appellant is requesting the development  
16 permit in order to install + 1300 linear feet of 15  
17 foot wide rock surface road, of which + 500 linear  
18 feet will be located below elevation 10.0 feet M.S.L.

19 "8. Notice of this public hearing was duly  
20 published in the Headlight Herald, a newspaper of  
21 general circulation as defined by ORS 193.010 (2)(b),  
22 on May 14, 1980.

23 "9. Notice of Public Hearing and maps of the  
24 requested area were mailed to all property owners  
25 within 250 feet of the exterior boundary of the  
26 property for which application has been made on May 9,  
27 1980.

28 "10. The property in question is zoned A-1 (Low  
29 Density Residential, (sic) Agricultural, Forestry and  
30 Recreation zone).

31 "11. The 100 year flood plane elevation is 10  
32 feet according to the Flood Insurance Rate Maps of the  
33 National Flood Insurance Program.

34 "12. The ground elevation where the new road in  
35 question begins is 8.5 feet and rises evenly to 10.2  
36 feet at the first turn in the road, and continues to  
37 12.5 feet at the next turn ending up at 11.3 feet at  
38 the end of the road.

39 "13. According to the said Flood Insurance Map  
40 approxiamtely (sic) 600 feet of the road in question  
41 is below flood plane and about 800 feet is above flood  
42

1 plane.

2 "14. The road in question is at least 200 feet  
3 from the Wilson River bank.

4 "15. There is considerable evidence that most, if  
5 not all, of the property in question has had flood  
6 water on it in years past.

7 "16. The section of Makinster Road immediately  
8 adjacent to the road proposed by appellant has been  
9 subject to severe flooding in past years.

10 "17. The average depth of fill for the proposed  
11 road is 8 inches.

12 "18. The portion of the proposed road above flood  
13 plane is in a zone of minimal flooding which is less  
14 than one foot according to the National Flood  
15 Insurance Map.

16 "19. The proposed road is not for farm practices,  
17 but is intended for use as an access road to Tax Lots  
18 1903, 1904, and 1905 of Section 13D, Township 1 South,  
19 Range 10 West of the Willamette Meridian."

20 "CONCLUSIONS OF LAW"

21 "1. The road proposed by appellant will cause  
22 the diversion of floodwater to areas not previously  
23 subject to these diversions.

24 "2. When combined with the proposed mobile home  
25 development for which the road is intended as access  
26 by appellant, said road and development will cause a  
significantly greater diversion of floodwater to areas  
not previously subject to these diversions.

"3. In addition to the diversion of floodwater  
to areas not previously subject to these diversions,  
the proposed road, especially when combined with the  
proposed mobile home development, will increase the  
amount of floodwater diverted to areas subject to such  
diversions already. These areas are already saturated  
by floodwaters during floods and can not absorb any  
more floodwaters than they already receive.

"4. There is a grave danger that persons who  
move into the proposed mobile home development would  
be trapped there during floods due to the large  
portion of the proposed access road which would flood

1 since it is below flood plane level. The Flood Hazard  
2 Zone seeks to minimize the need for rescue and relief  
efforts.

3 "5. The diversion of floodwaters caused by the  
4 proposed road would also present an added danger to  
5 MaKinster (sic) County Road and would be contrary to  
6 the purpose of the Flood Hazard Zone that seeks to  
7 minimize damage to public facilities and utilities  
8 such as streets.

9 "6. The diversion of floodwater by the proposed  
10 road would endanger the life and health of the  
11 residents in the area."

12 The applicable criteria in this case are set forth in the  
13 county's Flood Hazard Zone Ordinance. Petitioner contends the  
14 only applicable portion of this ordinance is section 4(a) which  
15 provides:

16 "No structure, fill, deposit, storage of material  
17 or other use may be allowed which, acting alone or  
18 when combined with all other existing and proposed  
19 development, materially affects the capacity to  
20 discharge flood water or causes the diversion of flood  
21 water to areas not previously subject to these  
22 diversions."

23 Respondents, on the other hand, argue that section 4(a) of the  
24 Flood Hazard Zone Ordinance is not the only applicable portion  
25 of the ordinance but that it was appropriate for the county to  
26 consider the "purposes" section of the ordinance which speaks  
in broad terms of protecting human life and health, minimizing  
damage to public facilities and utilities, etc.<sup>2</sup>

We need not resolve in this case whether it was appropriate  
for the county to look at the purposes section of its ordinance  
as well as subsection 4(a) in denying this development permit.  
The findings of fact are inadequate to serve as a basis for



1 drawing any conclusions with respect to the specific criteria  
2 contained in subsection 4(a) or the broad criteria set forth in  
3 the purposes section. The first ten findings of fact set forth  
4 background information concerning the permit application.  
5 Findings of Fact 11, 12, 13, 15, 16 and 18 refer to the  
6 flooding or flooding potential of the property. These  
7 findings, however, only set forth the basis for applying the  
8 Flood Hazard Zoning Ordinance to this permit application, a  
9 matter which all parties to this appeal already concede.  
10 Finding 19 appears to have no relevance for purposes of the  
11 flood hazard zone ordinance, since a road necessitating fill  
12 requires a permit whether or not it is for farm uses.<sup>3</sup> Only  
13 Findings of Fact 14 and 17 relate in any fashion to the  
14 criteria set forth in the Flood Hazard Zone Ordinance, and only  
15 to section 4(a) of the ordinance. The distance of the road  
16 from the river bank and the depth of fill relate to whether the  
17 road

18 "materially affects the capacity to discharge  
19 flood water, or causes the diversion of flood water to  
20 areas not previously subject to these diversions."  
Section 3.090(4)(a).

21 Findings of Fact 14 and 17, however, are not adequate in  
22 and of themselves to support any of the six Conclusions of Law  
23 contained in the county's order without at least some  
24 explanation as to why the existence of an average of 8 inches  
25 of fill and a distance of 200 feet from the Wilson River would  
26 cause the proposed road to affect the area's capacity to

1 discharge flood water or cause the diversion of flood water to  
2 areas not previously subject to these diversions. The lack of  
3 an explanation tying these facts to the conclusions is  
4 particularly critical here because the only person who  
5 testified directly ask to the effect of these two facts was the  
6 petitioner's expert witness. His testimony was that the  
7 average 8 inches of fill would cause a rise in the flood plane  
8 of .02 feet and would not cause a diversion of flood waters.

9 Accordingly, Conclusions of Law 1, 3, 5 and 6 which refer  
10 specifically to the diversion of flood water caused by the  
11 proposed road are not supported by adequate findings of fact in  
12 violation of ORS 215.416(6).

13 Conclusions of Law 2, 3 and 4 refer to the effect which a  
14 proposed mobile home development will have on diverting flood  
15 water and endangering the lives of persons who move into the  
16 area. There is no finding of fact, however, that a mobile home  
17 development is proposed by petitioner or is in any way  
18 connected to petitioner's request to construct a road. It may  
19 have been appropriate for the county to consider a proposed  
20 mobile home development and the impact which such development  
21 in conjunction with the road would have on flooding in the  
22 area. Section 4(a) of section 3.090 of the Flood Hazard Zone  
23 Ordinance quoted previously provides that "no...fill...may be  
24 allowed which, acting alone or when combined with all  
25 other...proposed development..." affects flood water discharge  
26 capacity or causes diversion of flood water. But there not

1 only is no finding of fact in the county's order that a mobile  
2 home development is a "proposed" development in this area,  
3 there is no substantial evidence in the record which would  
4 support such a finding. Although there was some discussion  
5 before both the planning commission and the board of county  
6 commissioners by concerned citizens about mobile homes in the  
7 area, there was no evidence that petitioner had any plans to  
8 develop the property with mobile homes. In the absence of any  
9 such evidence, it was error for the county to consider the  
10 impact which mobile home development might have on flooding in  
11 its decision to deny petitioner's request for a permit to  
12 construct a road.

13 Petitioner's third assignment of error is that the county's  
14 decision is not supported by substantial evidence in the whole  
15 record. We agree. There is no substantial evidence in this  
16 record, as previously mentioned, that the proposed road would  
17 materially affect flood water discharge capacity or would cause  
18 diversion of flood water to areas not previously subject to  
19 such diversion. The county was not necessarily required to  
20 accept the opinion of petitioner's expert, a professional  
21 registered engineer, with respect to the effect of the road on  
22 discharge capacity and diversion of flood waters. However, it  
23 cannot, without some explanation for doing so, simply ignore  
24 that testimony when there is no testimony in the record which  
25 specifically refutes the expert's opinion.

26 The lack of evidence that the proposed road would cause a

1 diversion of flood water coupled with the lack of evidence  
2 concerning a proposed mobile home development makes Conclusions  
3 of Law 1 through 6 unsupported by substantial evidence in the  
4 record.

5 CONCLUSION

6 Respondent's order denying petitioner's application for a  
7 road permit lacks adequate findings of fact to support the  
8 conclusion that the proposed road would cause a diversion of  
9 flood water to areas not previously subject to such diversions  
10 as well as to areas already saturated by flood waters. The  
11 findings of fact do not support the county's conclusion that  
12 the proposed road would endanger peoples' lives or cause  
13 excessive damage to public facilities and utilities. Moreover,  
14 there is no evidence in the record which would support the  
15 county's conclusions as to flooding, danger to human life or  
16 damage to public facilities and utilities. Respondent  
17 county's decision must be based upon the evidence contained in  
18 the record. There is no evidence in this record which would  
19 support denial of petitioner's permit application. The  
20 county's decision is, accordingly, reversed and remanded for  
21 further proceedings consistent with this opinion.

22 Reversed and Remanded.

23

24

25

26

FOOTNOTES

1  
2  
3 1  
4 The Notice of Intent to Appeal makes reference to the  
5 purpose of the road being to serve 9 tax lots owned by  
6 petitioner. Petitioner conceded, however, at oral argument  
7 that he did not know the basis for this statement. The only  
8 evidence we can find in the record is that the road would serve  
9 4 tax lots.

7 2  
8 Section 3.090 (1) of the Flood Hazard Zone is the purposes  
9 section and provides as follows:

10 "(1) Purpose

11 It is the purpose of the F-H zone to promote  
12 the public health, safety and general welfare and  
13 to minimize public and private losses due to  
14 flood conditions in specific areas by provisions  
15 designed to:

16 (a) protect human life and health;

17 (b) minimize expenditure of public money  
18 for costly flood control projects;

19 (c) minimize the need for rescue and relief  
20 efforts associated with flooding and  
21 generally undertaken at the expense of the  
22 public;

23 (d) minimize prolonged business  
24 interruptions;

25 (e) minimize damage to public facilities  
26 and utilities such as water and gas mains,  
electric, telephone and sewer lines, streets  
and bridges located in areas of special  
flood hazards;

(f) help maintain a stable tax base by  
providing for the sound use and development  
of flood prone areas in such a manner as to  
minimize future flood blight areas;

(g) make available to the potential home  
buyers information that identifies those

1 properties in an area of special flood  
2 hazard; and

3 (h) ensure that those who occupy the areas  
4 of special flood hazard assume responsibility  
for their actions."

5 3

6 Section 3.090(5)(a) of the Flood Hazard Zone Ordinance sets  
7 forth the permitted uses which do not require a permit.  
8 Included within those enumerated permitted uses are farm uses  
of the property. However, farm uses of the property which  
require fill are not permitted uses.