BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FOREST PARK ESTATE JOINT VENTURE,	)	
	)	
Petitioner,	)	LUBA No. 90-070
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
MULTNOMAH COUNTY,	)	
	)	
Respondent.	)	

Appeal from Multnonah County.

Richard M. Whitman and Stephen T. Janik, Portland, filed the petition for review. With them on the brief was Ball, Janik & Novack. Stephen T. Janik argued on behalf of petitioner.

John L. DuBay, Portland, filed the response brief and argued on behalf of respondent.

AFFIRMED 12/05/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a Multnomah County order denying approval of a 12-lot rural planned development and land division.

FACTS

The subject parcel is 120 acres in size. This undeveloped parcel is comprised of three subareas with relatively distinct characteristics. The northern subarea consists of approximately 60 steeply sloping wooded acres, descending to an intermittent stream running across the northwest corner of the parcel. The central subarea consists of approximately 20 acres of relatively flat open meadows on a ridge top running east-west across the parcel. The southern subarea consists of approximately 40 acres with moderate slopes, covered by a mixture of brush, grass and trees.

The subject parcel is designated Multiple Use-Forest by the Multnomah County Comprehensive Plan (plan) and is zoned Multiple Use Forest, 19-acre minimum lot size (MUF-19). The parcel is part of a peninsula of rural land which is bordered on three sides by the Portland Metropolitan Area Urban Growth Boundary (UGB). The parcel's eastern boundary and the eastern half of its northern boundary are coterminous with the UGB and the Portland city limits. The UGB is approximately 1/2 mile distant from the parcel to the

south, and approximately 1/4 mile distant to the west. The rural unincorporated property which borders the subject parcel to the northwest, west and south includes parcels zoned MUF-19, Exclusive Farm Use (EFU) and Rural Residential (RR).

On December 1, 1989, petitioner filed with the county planning department applications for a 12-lot rural planned development (RPD) and land division (LD) for the subject parcel.[1] The applications include a proposed general RPD plan and preliminary subdivision plan for the subject parcel. Under these plans, the northern subarea and most of the southern subarea would be protected from development by open space easements, requiring future residences to be clustered in the relatively flat central subarea of the parcel. Record 306-307. The proposed lots would range from 3.1 to 17.7 acres in size.

The county planning commission held a public hearing on the proposed RPD on January 22, 1990, and a public hearing on the proposed LD on February 26, 1990. The planning commission's written decision approving the proposed RPD and

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[1]As explained infra, for the most part the county consolidated its proceedings on these two applications. However, the county transmitted a separate record document for each application to this Board. These two record volumes contain primarily, although not entirely, the same documents. Identical documents do not always, however, have the same page number in both record volumes. Record citations in this opinion are to the record volume submitted for the RPD. Citations to documents in the LD record volume which are not also in the RPD record volume are indicated by "Record (LD) ____."

LD, with conditions, was adopted on February 26, 1990 and filed with the county clerk on March 8, 1990.

At its March 20, 1990 meeting, the county board of commissioners decided to conduct a de novo review of the planning commission's decision. Record 56. Following a de novo evidentiary hearing on April 24, 1990, the board of commissioners decided to reverse the planning commission's decision and deny the requested RPD and LD. The board of commissioners' order was filed with the county clerk on May 3, 1990, and became final on May 14, 1990.[2] This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Board's reversal of the Planning Commission decision to approve the applications was beyond its jurisdiction, did not comply with applicable provisions of the county's land use regulations, improperly construed applicable law, and was outside the range of discretion allowed under the county's implementing ordinances due to the fact that the Planning Commission's decision approving the applications had already become final."

With regard to finality of planning commission decisions, MCC 11.15.8260(A) provides:

> "Decisions of the Planning Commission * * * shall be final at the close of business on the tenth day

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[2]Multnomah County Code (MCC) 11.15.8280(D) provides:

> "The [Board of Commissioners'] decision shall be final at the close of business on the tenth day after the Decision, Findings of Fact and Conclusions have been filed [with the Clerk of the Board] unless the Board on its own motion grants a rehearing * * *."

following submittal of the written decision to the Clerk of the Board under MCC .8255,[3] unless:

"(1) A Notice of Review from a party is received by the Planning Director within ten days after the decision has been submitted to the Clerk of the Board under MCC .8255; or

"(2) The Board, on its own motion, orders review under MCC .8265."

MCC 11.15.8255 provides as follows with regard to submittal of planning commission decisions to the clerk:

"The written decision of the Planning Commission * * * shall be submitted to the Clerk of the Board by the Planning Director not later than ten days after the decision is announced. The Clerk shall summarize each decision on the agenda for the next Board [of Commissioners] meeting on planning and zoning matters * * *."

MCC 11.15.8265 provides the following with regard to board of commissioners' decisions to review planning commission decisions:

"A Board Order for Review of a [planning commission] decision must be made at the meeting at which the Board's Agenda included a summary of that decision under MCC .8255, unless specifically continued, which continuance shall not be later than the next regular Board meeting on planning and zoning matters."[4]

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[3]This section is more completely cited as MCC 11.15.8255. The county's zoning ordinance is Chapter 11.15 of the MCC. Within Chapter 11.15, zoning ordinance provisions are referred to simply by their four digit section number.

[4]On January 8, 1987, the board of commissioners issued an order adopting rules for the conduct of its meetings. Section 4.A.1 of that order provides that regular meetings "shall be held the first and third Tuesdays and other Tuesdays as necessary for the conduct of land use issues * * *."

Petitioner argues that because the planning commission's decision approving the proposed RPD and LD was filed with the county clerk on March 8, 1990, under MCC 11.15.8260(A), the decision became final on March 19, 1990. Therefore, according to petitioner, the board of commissioners had no authority to order review of the planning commission decision on March 20, 1990.

Petitioner argues that in Century 21 Properties, Inc. v. City of Tigard, 99 Or App 435, 783 P2d 13 (1989), the Court of Appeals determined if a local governing body fails to order review of the decision of an inferior tribunal within the time limit established by its own regulations, the governing body lacks jurisdiction to conduct such a review. Petitioner maintains that under both the Tigard code and MCC 11.15.8260(A), the governing body had ten days within which to initiate review of a planning commission decision on its own motion.[5] Petitioner concludes the board of commissioners' decision to initiate review of the planning commission's decision was, therefore, beyond the range of discretion allowed by the county's implementing

[5]Petitioner further argues that interpreting MCC 11.15.8260(A) to allow the board of commissioners more than ten days to initiate review of a planning commission decision, so long as review is initiated at the next regular board meeting, is contrary to the plain language of the ordinance. Petitioner contends a similar argument that the Tigard code should be interpreted to provide that the period for initiating review does not begin to run until a decision is made available to the governing body was specifically rejected by the Court of Appeals, Century 21, 99 Or App at 438-439, and this precludes such an interpretation of similar provisions in the MCC.

ordinances and Century 21 requires reversal. ORS 197.835(8).

The county argues that in accord with MCC 11.15.8255, after the planning commission's decision was filed with the county clerk on March 8, 1990, the clerk placed a summary of the decision on the agenda of the board of commissioners' next regular meeting on planning and zoning matters, scheduled for March 20, 1990. The county argues that the board of commissioners' March 20, 1990 order to initiate review was made at the meeting where the agenda included the clerk's summary of the planning commission decision and, therefore, was properly within the time limit for initiating such review established by MCC 11.15.8265. According to the county, under MCC 11.15.8260(A)(2), compliance with MCC 11.15.8265 prevented the planning commission's decision from becoming final.

The county further argues that the MCC provisions at issue here are not like the Tigard code provisions at issue in Century 21. According to the county, the Tigard code provided that the city council could initiate its own review only if the council "on its own motion seeks review * * * within ten days of mailed notice of the final decision." Century 21, 99 Or App at 437. In contrast, the MCC requires the board of commissioners to act at the next meeting of the board concerning planning and zoning matters.

We agree with the county's interpretation of these MCC

provisions. Under MCC 11.15.8260(A), a planning commission decision becomes final ten days after being submitted to the county clerk, unless either of two events occurs. One event is the filing of a notice of review by a party within ten days after the planning commission decision is submitted to the county clerk. MCC 11.15.8260(A)(1). The other event is the board of commissioners ordering review in accordance with MCC 11.15.8265. MCC 11.15.8260(A)(2). In contrast to MCC 11.15.8260(A)(1), there is no requirement in MCC 11.15.8260(A)(2) (or MCC 11.15.8265) that a board of commissioners' order of review be adopted within ten days after the planning commission decision is submitted to the clerk.[6]

In this case, the board of commissioners complied with MCC 11.15.8265 by ordering review of the planning commission decision on March 20, 1990, at its next meeting concerning

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[6]We do not agree with petitioner that this interpretation of MCC 11.15.8255, 11.15.8260(A) and 11.15.8265 leads to an unreasonable result. Under this interpretation, after a planning commission decision is filed with the county clerk, it simply cannot definitively be determined to be final until ten days have elapsed without the filing of a notice of review by a party and the board of commissioners fails to order review at its next meeting on planning and zoning matters, or at the following such meeting, if the board of commissioners specifically continues the matter. In addition, contrary to petitioner's assertion, this interpretation does not result in a need to file precautionary appeals to this Board. If a party is unhappy with a decision of the planning commission, that party must pursue available administrative remedies by filing a notice of review within ten days after the decision is submitted to the clerk. MCC 11.15.8260(A)(1); ORS 197.825(2)(a). If a party is content with the decision of the planning commission, there is no need to file a precautionary appeal to this Board while waiting to find out if the planning commission's decision will become final.

land use planning matters after the decision was submitted to the county clerk. Accordingly, under MCC 11.15.8260(A)(2), the board of commissioners order prevented the planning commission decision from becoming final and the board of commissioners had jurisdiction to review that decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The Board's reversal of the Planning Commission decision to approve the applications was beyond its jurisdiction, did not comply with applicable provisions of the county's land use regulations, improperly construed applicable law, and was outside the range of discretion allowed under the county's implementing ordinances due to the fact that the final action was taken more than 120 days after the date the applications were filed as required by county ordinance."

THIRD ASSIGNMENT OF ERROR

> "The Board's reversal of the Planning Commission decision to approve the applications was beyond its jurisdiction and improperly construed applicable law due to the fact that the final action was taken more than 120 days after the date the applications were filed as required by ORS 215.428(1)."

ORS 215.428(1) provides:

> "Except as provided in subsections (3) and (4) of this section, the governing body of a county or its designate shall take final action on an application for a permit or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete."

MCC 11.15.8280(E) provides:

> "The Board [of Commissioners] shall render a decision within 120 days from the time the application for that action is accepted as being complete * * *."

The subject applications were filed on December 1, 1989. Petitioner argues that the 120-day time limit established by ORS 215.428(1) and MCC 11.15.8280(E) for final county action on the applications expired 120 days later, on March 31, 1990. According to petitioner, any action taken by the county board of commissioners on those applications after March 31, 1990, was beyond its jurisdiction. Petitioner contends that after March 31, 1990, the board of commissioners was without authority to reverse the decision of the planning commission and, therefore, the planning commission decision is final. Petitioner argues that because the board of commissioners' decision exceeded its jurisdiction, is outside the range of discretion allowed under the MCC and violates provisions of applicable law, it must be reversed. ORS 197.835(7)(a)(A), 197.835(8); OAR 661-10-071(1)(c).

The county argues that even if the board of commissioners' decision was not made within the time limits established by ORS 215.428(1) and MCC 11.15.8280(E),[7] that

[7]The county also suggests that perhaps the 120-day time limit of ORS 215.428(1) and MCC 11.15.8280(E) was not exceeded because (1) the applications were not "deemed complete" until December 31, 1989, 30 days after they were filed; and (2) the board of commissioners voted to approve the applications on April 24 1990, 114 days after the applications were deemed complete. See Simon v. Bd. of Co. Comm. of Marion Co., 84 Or App

does not mean the board of commissioners lacked authority to make a decision. The county points out that neither the statute nor the MCC provision imposes specific consequences where a county makes a final decision on an application after the 120-day time limit. In particular, neither the statute nor the MCC states that the county loses its authority to make a decision on an application after the 120-day time limit, or that such decisions are without effect.

On the other hand, according to the county, the statute does provide a remedy for an applicant frustrated by a county failure to take final action within 120 days. Under ORS 215.428(7), applicants may file mandamus proceedings to compel approval of an application if the county fails to act within the 120-day time period.[8] The county cites Simon v. Board of Co. Comm. of Marion Co., 91 Or App 487, 755 P2d 487 (Simon II), where the Court of Appeals affirmed the trial

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311, 314, 733 P2d 901 (1987) (Simon I) (under ORS 215.428, if county does not notify applicant within 30 days that application is incomplete, the application is deemed complete 30 days after it is filed).

[8]ORS 215.428(7) provides:

> "If the governing body of the county or its designate does not take final action on an application for a permit or zone change within 120 days after the application is deemed complete, the applicant may apply in the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designate to issue the approval. The writ shall be issued unless the governing body shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations as defined in ORS 197.015."

court's denial of an alternative writ of mandamus under ORS 215.428(7). In Simon II, the county denied a minor partition application more than 120 days after the application was deemed complete. After the county's decision was made, the applicant sought a writ of mandamus under ORS 215.428(7) to compel approval of the application. The county argues that the Court of Appeals did not find in Simon II that the tardy county decision was made without authority, but rather stated:

> "* * * The evident purpose of ORS 215.428 is to ensure that local governing bodies issue a decision. Once the governing body acts, the purpose of ORS 215.428(7) has been met, and there is no reason for resort to circuit court." (Footnote omitted.) Simon II, 91 Or App at 491.

The county finally argues that the language of MCC 11.15.8280(E), which mirrors that of ORS 215.428, was adopted after enactment of that statute and cannot reasonably be interpreted differently from the statute it is designed to implement.

The county did not take final action on the subject applications within the time limits established by ORS 215.428 and MCC 11.15.8280(E).[9] However, the county is

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[9]We agree with the county that under ORS 215.428, the subject applications were not deemed complete until December 31, 1989, and, therefore, the 120-day time limit established by ORS 215.428 did not expire until April 30, 1990. However, ORS 215.428(1) requires that final action be taken within the 120-day time limit. In this case, the board of commissioners' decision did not become final until May 14, 1990, and thus the time limit of ORS 215.428 was not met. We further note that MCC 11.15.8280(E) does not contain language similar to that of ORS 215.428

correct that neither the statute nor the MCC provides that the county loses its jurisdiction or authority to act after the 120-day time limit has elapsed. As the Court of Appeals said in Simon II, supra, the purpose of ORS 215.428 is "to ensure that local governing bodies issue a decision." See also Kilian v. City of West Linn, 15 Or LUBA 585, 590 n 3, aff'd 88 Or App 242 (1987). The remedy employed by the statute to effectuate that purpose is to allow the applicant to seek a writ of mandamus if the local government does not take final action within the 120 days. ORS 215.428(7).[10] If a local government does make a final decision, after the 120-day time limit, but before a writ of mandamus is obtained by the applicant, the statutory purpose would not be served by declining to give that decision effect.[11]

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regarding when an application is "deemed complete" and requiring a county to notify the applicant within 30 days if the application is incomplete. There is nothing in MCC 11.15.8280(E) which supports a conclusion that an application is not "accepted as being complete" by the county until 30 days after it is filed. However, in any case, the county did not "render a decision," as required by MCC 11.15.8280(E), until the board of commissioners' decision became final on May 14, 1990.

[10]As far as we can determine, the MCC does not refer to an applicant's statutory right to seek a writ of mandamus or provide any other remedy for county failure to comply with the time limit established by MCC 11.15.8280(E). However, contrary to petitioner's interpretation, the MCC does not provide that a planning commission decision under review by the board of commissioners becomes final if the board of commissioners does not make a final decision on the application within the time allowed by MCC 11.15.8280(E).

[11]In Simon II the court upheld the denial of a writ of mandamus under such circumstances, but did not directly address the issue of whether a county has authority to make a final decision on an application after the 120-day time limit of ORS 215.428 has expired. However, it is unlikely that the court would have denied the writ of mandamus if it believed that

We conclude that the county did not act without jurisdiction or exceed the range of discretion allowed by its land use regulations in making a final decision on the subject applications on May 14, 1990.

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

> "By not releasing the staff report on the applications until four days before the hearing, the County violated ORS 197.763(4)(b) and MCC Section 11.15.8230(C), acted beyond its jurisdiction, and prejudiced the substantial rights of [petitioner]."

ORS 197.763(4)(b) provides as relevant:

> "Any staff report used at [a quasi-judicial land use] hearing shall be available at least seven days prior to the hearing. * * *"

MCC11.15.8230(C) provides:

> "No action shall be heard unless a Staff Report is completed and available at the office of the Planning Director at least five days prior to the date fixed for hearing. * * *"

Petitioner argues that the county issued a new planning staff report only four days before the scheduled board of commissioners de novo hearing on the subject applications. Petitioner contends the issuance of the new staff report violated the requirements of ORS 197.763(4)(b) and MCC 11.15.8230(C) that a staff report be available at least seven days or five days, respectively, prior to the

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ORS 215.428 deprives counties of the authority to act on applications after the 120-day time limit has elapsed.

scheduled hearing. Petitioner argues that because of the county's delay in issuing the staff report, it was not able to submit its response to the staff report to the board of commissioners until the day before the hearing, giving the commissioners inadequate time to review the response, and it had inadequate time to prepare for the hearing. Petitioner contends that these consequences resulting from the delay in issuing the staff report constitute prejudice to petitioner's substantial rights and, therefore, the county's decision should be remanded. ORS 197.835(7)(a)(B). Petitioner further argues that under MCC 11.15.8230(C), the board of commissioners was prohibited from proceeding with its hearing and, therefore, the county's decision should be reversed. OAR 661-10-071.

The county concedes that the supplemental staff report prepared for the April 24, 1990 board of commissioners hearing was not available seven days prior to the hearing, as required by ORS 197.763(4)(b). However, the county contends that the supplemental staff report was available at the planning department offices on April 19, 1990, five days prior to the hearing, in compliance with MCC 11.15.8230(C). The county argues there is nothing in the record which indicates otherwise.[12]

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[12]The county points out that the supplemental staff report, at Record 38-43, by county custom, bears the April 24, 1990 date of the scheduled hearing, and that there is nothing in the record which establishes the date that report became available at the county planning offices.

The county also argues that regardless of whether the supplemental staff report was available four or five days before the hearing, any violation of ORS 197.763(4)(b) or MCC 11.15.8230(c) in this regard would constitute a procedural error which is grounds for reversal or remand only if petitioner demonstrates prejudice to its substantial rights. The county states that nothing in ORS 197.763 or the MCC gives petitioner a right to file a written response to a staff report. The county also argues petitioner has failed to identify how its written response or its efforts to prepare for the April 24, 1990 hearing were impaired by any late issuance of the staff report. Finally, the county argues that there is nothing in the record to support petitioner's claim that the board of commissioners' review was hampered by reduced time to review petitioner's written response to the supplemental staff report.

The requirements of ORS 197.763(4)(b) and MCC 11.15.8230(C) that staff reports be available a certain number of days prior to hearings are procedural requirements. Failure to follow applicable procedural requirements is grounds for reversal or remand of the county's decision only if petitioner demonstrates prejudice to its substantial rights. ORS 197.835(a)(B). The county is correct that petitioner did not have a right to submit a written response to the supplemental staff report prior to the April 24, 1990 hearing. Nevertheless, petitioner did

submit an eight-page response to the board of commissioners on April 23, 1990, and presented oral argument in response to the staff report at the April 24, 1990 hearing. Although petitioner makes a general claim that its written and oral responses were impaired because the supplemental staff report became available only four days before the hearing, petitioner does not identify any ways in which its written and oral responses would have been different or more complete if the staff report had been available earlier.

We conclude that regardless of whether the supplemental staff report became available four or five days prior to the April 24, 1990 hearing,[13] petitioner has failed to demonstrate that its substantial rights were prejudiced by any failure of the issuance of that report to comply with ORS 197.763(4)(b) or MCC 11.15.8230(C).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

"By not mailing notice of its hearing to adjoining

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[13]The parties agree that the supplemental staff report was not available seven days before the April 24, 1990 board of commissioners hearing, as is required by ORS 197.763(4)(b). However, we cannot determine based on the record before us whether the county failed to comply with the requirement of MCC 11.15.8230(C) that the supplemental staff report be available five days before the hearing, as petitioner does not cite evidence in the record which supports its claim that the report was not available until April 20, 1990. We note that ORS 197.835(13)(b) provides that "in the case of disputed allegations of * * * procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations." However, as explained in the text, petitioner's allegation that the staff report was not available until April 20, 1990, even if proven, would not warrant reversal or remand of the county's decision.

> property owners within 500 feet, the County violated ORS 197.763(2)(c) and prejudiced the substantial rights of [petitioner]."

ORS 197.763(2)(c) requires that notice of quasi-judicial land use hearings governed by ORS 197.763(2)(c) be mailed to record owners of property within 500 feet of the subject property when "the subject property is within a farm or forest zone."

Petitioner argues that a comparison of the county assessor's records with the list of people mailed notice of the April 24, 1990 hearing shows that the county failed to mail the notice to 18 persons who qualify for notice under ORS 197.763(2)(c). Petitioner claims that two such persons contacted petitioner after the hearing and specifically indicated that they did not receive notice of the hearing, they supported the application, and they would have given favorable testimony in support of the application.[14] Petitioner argues its substantial right to obtain this favorable testimony was prejudiced by the county's failure to give the required notice of the hearing.

The county argues that petitioner has failed to demonstrate that its substantial rights were prejudiced by any failure of the county to provide required notice of the April 24, 1990 hearing to owners of nearby property. The

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[14]Petitioner supports this claim with an affidavit by one of its attorneys, in which the attorney describes telephone conversations with these persons.

county objects to the affidavit submitted by petitioner. The county argues that the affidavit is not part of the record in this appeal and contains hearsay statements. The county points out that petitioner has not moved for an evidentiary hearing pursuant to ORS 197.830(13)(b) and OAR 661-10-045 and, therefore, contends there is no basis for consideration of the affidavit by this Board.

Our review is generally limited to the local government record. ORS 197.830(13)(a). In certain circumstances, we are authorized under ORS 197.830(13)(b) to take additional evidence and make findings of fact on disputed allegations concerning procedural irregularities. See n 13. The disputed affidavit is not part of the record and petitioner has not moved for an evidentiary hearing to submit the affidavit to us. We understand the county to dispute the contents of the affidavit. In these circumstances, we agree with the county that we cannot consider the affidavit.[15]

Without the support of the affidavit, petitioner's argument that its substantial rights were prejudiced is essentially reduced to a contention that if notice of the April 24, 1990 hearing had been mailed to the 18 additional property owners, one or more of those persons might have appeared at the hearing and might have offered relevant

[15]This Board does, however, consider affidavits submitted in support of allegations concerning issues such as procedural irregularities or standing where the other parties do not contest the facts therein. Flowers v. Klamath County, 17 Or LUBA 1078, 1103 (1989).

testimony in support of the application.[16] Petitioner itself recognizes that "[n]ormally, the failure to send notice to parties other than [petitioner] would not prejudice the substantial rights of the petitioner, so long as the petitioner received proper notice." Petition for Review 16. We agree.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The notice mailed for the Board's hearing did not comply with the standards in ORS 197.763(3) and prejudiced the substantial rights of [petitioner]."

Petitioner contends that the notice given by the county of the April 24, 1990 hearing failed to "list the applicable criteria from the ordinance and the [comprehensive] plan that apply to the application at issue," as required by ORS 197.763(3)(b).[17] Petitioner argues that by failing to

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[16]Even if such persons would have appeared at the hearing and offered relevant testimony, we have no way of determining whether such testimony would have included new facts or legal arguments, or simply would have duplicated the testimony that was received in this matter. Furthermore, even if we were to consider the affidavit discussed in the text above, it makes no attempt to identify the nature of the testimony that would have been presented, beyond claiming it would have been in support of the application.

[17]Petitioner also contends that the contents of the county's notice of hearing failed to comply with ORS 197.763(3)(e), (h), (i) and (j). However, petitioner does not claim that its substantial rights were prejudiced by these violations, but rather that on the basis of these violations and the violation of ORS 197.763(3)(b), petitioner should not be precluded under ORS 197.830(10) from raising in this appeal issues which it did not raise before the county. Because the county does not contend that petitioner should be precluded from raising any issues in this appeal, we need not determine whether petitioners' allegations concerning county

inform petitioner of the standards applicable to its applications, the county prejudiced its substantial right to be informed of the criteria its applications were required to meet. According to petitioner, the county's decision should therefore be remanded with direction that the county give proper notice.

The county argues that any failure of the contents of the hearing notice to comply with ORS 197.763(3)(b) is grounds for reversal or remand only if petitioner's substantial rights were prejudiced. Marshall v. City of Eugene, 16 Or LUBA 206 (1987).

The county contends that petitioner does not claim surprise and, in fact, was not surprised by any of the plan or MCC standards applied by the county in its decision. The county maintains that its final decision was based on the same criteria addressed in petitioner's applications (Record 302-395; Record(LD) 271-367), the planning commission's decision (Record 59-87), the original staff report (Record 220-261) and petitioner's response to the supplemental staff report (Record 44-51).

We agree with the county that failure to comply with the requirement of ORS 197.763(3)(b) that notice of hearing list applicable plan and code approval criteria is basis for reversal or remand only if petitioner's substantial rights

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failure to comply with the notice requirements of ORS 197.763(3)(e) and (h)-(j) are correct.

are prejudiced thereby. ORS 197.835(7)(a)(B). We also agree with the county that the record demonstrates petitioner was fully aware, prior to the board of commissioners' April 24, 1990 hearing, of the criteria in the plan and MCC applicable to its applications. Therefore, any county failure to comply with ORS 197.763(3)(b) in giving notice of the April 24, 1990 hearing did not prejudice petitioner's substantial rights.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

> "The findings adopted by the Board [of Commissioners] in support of its conclusion that the RPD does not utilize as gross site acreage, land generally unsuited for forest uses, considering the terrain, adverse soil conditions, drainage or flooding, vegetation or the location or size of the tract are inadequate, misconstrue applicable law and are not supported by substantial evidence in the whole record."

Approval of a proposed RPD requires a determination that it will:

> "Utilize as gross site acreage, land generally unsuited for agricultural or forest uses, considering the terrain, adverse soil or land conditions, drainage or flooding, vegetation or the location or size of the tract." MCC 11.15.7750(B).

The county decision concluding the proposed RPD does not meet the above quoted standard contains separate sections concerning "economic suitability" and "environmental suitability." The petition for review makes separate challenges to these portions of the county's decision, and

we address the issues separately below.

A. Economic Suitability

The county's findings on economic suitability state:

> "* * * RPD approval criteria do not require a finding of economic viability, nor do they specify a profit threshold or minimum rate of return to determine a site generally suited or unsuited for forest use. Applicant's claim of unsuitability for forest use in large part relies on an economic analysis. The fact that projected economic returns from forest use of the site are lower than the applicant's expectations or desires does not render the site unsuitable for forest use. State Goals and County policies protecting forest lands do not require an economic viability test to determine which lands are suitable for forest use.
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> "We note that the Soil Conservation District and SCS and the Office of the State Forester did not agree with the applicant's conclusions regarding economic viability of the site for forest use. The State Forester provided written comments [stating the applicant's] 'analysis actually tells the reader that quite simply, the potential investor will just not receive as much as he wished to receive, but the returns will be positive.' * * * The Board [of Commissioners] is persuaded by these comments. * * * [T]he Board finds that economic constraints do not, by themselves or in combination with other factors, render the site generally unsuitable for forest uses." (Emphasis in original; citation omitted.) Record 14-15.

The above quoted findings interpret MCC 11.15.7750(B) to provide that a specific minimum rate of return on investment is not required for a parcel to be generally suitable for forest uses. The findings also determine that forest use of the property will produce a positive return on investment, although not as great a return as the applicant

desires, and conclude this fact does not support a determination that the subject parcel is generally unsuitable for forest uses.

Petitioner does not challenge the county's interpretation of MCC 11.15.7750(B) that a specific rate of return on investment is not required in order for the parcel to be generally suitable for forest uses. Petitioner does, however, challenge (1) the evidentiary support for the determination that forest use of the property will produce a positive return on investment, and (2) the conclusion that if forest use of the property will produce a positive return on investment, economic suitability is not a factor which supports a determination that the subject parcel is generally unsuitable for forest uses. With regard to evidentiary support for the finding that forest use will produce a positive return, petitioner states:

> "* * * While the analysis prepared by John Davis [the applicant's forestry consultant] showed that a forest use would generate gross revenue (as would any economic use), it did not show that returns 'will be positive.' Rather, the analysis showed that a forest use would generate a net real rate of return on the investment required of negative 3.7%, and a projected loss of $43,000. * * *" Petition for Review 20.

The county replies that the Davis analysis reflects a selection of 8% as the required rate of return. The county contends the results of Davis's analysis are expressed in relation to this target rate of return, rather than as actual rates of return. According to the county, the Davis

analysis shows that the actual rate of return on investment from use of the subject parcel for forestry would be between 4.13% and 5.03%. Record 375. The county argues the record shows that real rates of return on long term investments are typically less than those predicted by the Davis analysis, but in any case, contends selection between investment choices is not a proper test of whether land is generally suitable for forest uses. The county maintains the evidence in the record supports its conclusion that economic constraints do not render the subject parcel generally unsuitable for forest uses.

The Davis analysis is based on a required 8% rate of return on investment. Davis explains the basis for his economic analysis as follows:

> "The purpose of a discounted cash flow analysis is to simulate, as accurately as possible, the expected costs and incomes from a particular investment, and to determine if the indicated income yields an acceptable rate of return. * * * When evaluating any particular investment, its required rate of return must at least equal those returns that are available from alternate investments; when it does not the investment is rejected.
>
> "* * * Thus, an analysis that merely shows some level of return, but one that is below the required level, is a very clear indicator to the investor that his money should be invested elsewhere. The [analysis of the proposed RPD] fits this pattern with a required rate of return of 8% and actual returns of 4% to 5% (real)." (Emphasis in original.) Record 311.

In addition, an appendix to the first Davis report indicates

that commercial forest use of the northern, central and southern subareas of the subject parcel would produce "internal rates of return" of 4.13%, 5.03% and 4.33%, respectively and, therefore, compared to a "required rate of return" of 8%, would have "net rates of return of -3.87%, -2.97% and -3.67%, respectively. Record 375. This makes it clear that the overall negative 3.7% rate of return and loss of $43,000 projected by the Davis analysis and cited in the petition for review are figures which merely compare the projected actual rate of return and profits from forest use of the subject parcel to what would be obtained with the desired 8% rate of return.

We conclude that the analysis by the applicant's forestry consultant itself supports a finding that forest use of the subject parcel will produce a positive (approximately 4.3%) rate of return on investment and, therefore, that the county's determination is supported by substantial evidence in the record.[18] We also agree with the county that the fact that forest use of the subject parcel would produce a positive return on investment does not in itself, or in combination with other factors, support a determination that the subject parcel is generally

[18]Because we find that the Davis analysis itself supports the challenged finding, we need not consider petitioner's additional arguments challenging the reliability of other evidence in the record which also supports a conclusion that forest use of the subject parcel would yield a positive rate of return.

unsuitable for forest use.[19] See Reed v. Lane County, ___ Or LUBA ___ (LUBA No. 90-006, June 21, 1990), slip op 11 (whether a farmer can make a profit on a particular piece of farm land is at best indirect evidence of whether the land itself is generally unsuitable for the production of farm crops and livestock).

This subassignment of error is denied.

B. Environmental Suitability

The county's findings on environmental suitability state:

> "The Board [of Commissioners] heard testimony and received evidence that the soils and slopes on this site are typical of productive forest resource lands throughout northwest Multnomah County. * * * 1000 Friends of Oregon states * * * that 'the Cascade soils [have] only slight to moderate forest management concerns for equipment use, seedling mortality, windthrow hazard and plant competition.' [A] forester representing 1000 Friends of Oregon testified before the Board that the physical character of the site is well suited to forest practices common to northwest Oregon * * *. The West Multnomah Soil and Water Conservation District [WMS&WCD] and USDA Soil Conservation Service [SCS] * * * state in part that

[19]Petitioner also challenges the evidentiary support for county findings that the rate of return projected by the Davis analysis would be increased if different assumptions regarding the nature of optimal forest management practices were made. However, because we determine that the positive rate of return projected by the Davis analysis is itself a sufficient basis for the county's determination that the subject parcel is not generally unsuitable for forest uses, the additional findings challenged by petitioner are not necessary to the county's decision and no purpose would be served by reviewing them for evidentiary support. Territorial Neighbors v. Lane County, 16 Or LUBA 641, 657 (1988); Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984).

> "'[t]he Cascade soil is one of the more productive soils in Multnomah County. Site Index is a measure of the productive potential of a soil for tree growth. For the Cascade soil, the Multnomah County Soil Survey interpretive record lists a Site Index of 115 for Douglas Fir. * * * Site indices are grouped into site classes for forestry purposes. Site Class I has the highest potential, Site Class V the lowest. Cascade soils are generally rated a low Site Class II or a high Site Class III in this area.' [Record 268.]
>
> "The Board finds the site is predominantly composed of soils having a Class II or III site rating and, therefore, suitable for production of forest crops.
>
> "We do not agree that proximity to rural residential land and land inside the UGB necessarily renders the site unsuitable for forest use. Evidence indicates the management of forest land for timber production is protected under State Law. * * * Further, we find that [the] low residential densities allowed in the area, coupled with the large size of the subject site (120-acres), provides opportunities to buffer future residences from potential forest management activities on the site.
>
> "The Board concludes that testimony and substantial evidence in the record regarding the terrain, soils, drainage, vegetation, location and size of the tract, support a finding that this site is suitable for forest uses. The RPD request does not meet the generally unsuitable for forest uses standard." (Emphasis in original.) Record 15-16.

Petitioner argues that the county's findings are inadequate because they fail to address the factors listed as considerations in determining whether land is generally

unsuited for forest uses in MCC 11.15.7750(B). Petitioner also asserts that the findings are impermissibly conclusory and are not supported by substantial evidence in the record.

Petitioner contends the county's findings rely primarily on letters submitted by 1000 Friends of Oregon and the WMS&WCD. According to petitioner, the assertions made regarding environmental suitability for forest uses in both of these letters rely on the SCS Soil Survey of Multnomah County (soil survey). Record 215, 268. Petitioner contends that information in the soil survey is based on a general soil map, with regard to which the soil survey states:

> "Because of its small scale, the map does not show the kind of soil at a specific site. Thus, it is not suitable for planning the management of a farm or field or for selecting a site for a road or building or other structure. The kinds of soil in any one map unit differ from place to place in slope, depth, stoniness, drainage, or other characteristics that affect their management." Soil Survey, p. 4.

According to petitioner, by its own terms the soil survey should not be relied on for a site specific analysis such as that required by MCC 11.15.7750(B) and, therefore, the 1000 Friends and WMS&WCD letters cannot constitute substantial evidence in support of the county's unsuitability determination.

Petitioner argues that in contrast, the evidence submitted by its two experts, Davis (Record 311-321, 368-379) and Geotechnical Resources (Record 381-393; Supp. Record 49-51), is based on multiple onsite observations.

According to petitioner, the unrefuted conclusions of its experts were that forest use of the site would lead to severe erosion problems (Record 382-383), and that because of site location, steep slopes and clearing requirements, the site is not suitable for forest use. Record 313-315, 368-373. Petitioner contends that based on the evidence in the record, no reasonable decision maker could decide, as the county did, that the subject parcel is suitable for forest use.

The county argues that the original application includes a portion of the soil survey general soil map showing that the subject parcel contains large amounts of Cascade silt loam soil and description of the characteristics and uses of such soil from the soil survey. Record 369-362. The county further argues that while the soil survey general soil map may not be accurate enough for selecting building sites or determining management of a particular field, it is not being used for such purposes in this case. The county contends petitioner has never claimed that the soils on the property are not Cascade silt loam.[20] The county argues that in the absence of evidence that the soils on the subject parcel are not Cascade silt loam, the county was justified in relying on evidence based on the

[20]The county also points out that Davis, petitioner's forestry consultant, stated the subject parcel is Site Class III for Douglas fir. Record 368.

soil survey map and soil description.

The county also argues that the record does not support petitioner's claim that Geotechnical Resources testified that the soils on the subject parcel would be subject to "severe erosion problems" if put to forest use and, therefore, is not suitable for such use. According to the county, the most petitioner's geotechnical expert said was that because of "potential" for erosion and susceptibility to soil creep and small scale landsliding, use of the property for reforestation must "carefully consider these conditions." Record 382.

The county concludes:

> "Considering the abundant evidence that the site consists of Cascade silt loams with Site Class II or III forest productivity ratings and the limited conflicting evidence of environmental factors restricting the use of the site for forest uses, substantial evidence supports the Board [of Commissioners'] conclusion the site is not unsuitable for forest use." Respondent's Brief 23.

An applicant for quasi-judicial land use approval has the burden of proving that applicable approval standards are met. Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973); Knapp v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-064, October 31, 1990), slip op 15; Billington v. Polk County, 13 Or LUBA 125, 131 (1985). If findings adopted in support of a denial adequately explain a sufficient basis for denial, they will be upheld. Valley View Nursery v. Jackson County, 15 Or LUBA 591, 598 (1987);

Cook v. City of Eugene, 15 Or LUBA 344, 347 (1987). Furthermore, in challenging the county's determination of noncompliance with MCC 11.15.7750(B) on evidentiary grounds, petitioner bears a heavy burden. It is not sufficient for petitioner to show there is evidence in the record which supports its position. Rather, the "evidence must be such that a reasonable trier of fact could only say [petitioner's] evidence should be believed." McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982); see Jurgenson v. Union County, 42 Or App 505, 510, 600 P2d 1241 (1979).

With regard to petitioner's challenge to the county's findings on environmental suitability, we believe the findings explain that the county believes the soils and slopes on the subject parcel are typical of productive forest resource lands in northwest Multnomah County, are well suited to production of forest products and are forest Site Class II or III. The findings also explain the county's reasons for rejecting the view of petitioner's forestry consultant that the proximity of nonforest designated land and uses render the subject parcel unsuitable for forest uses. We conclude the findings adequately explain the basis for the county's conclusion that petitioner failed to demonstrate compliance of the proposed RPD with the "generally unsuitable for forest uses" standard of MCC 11.15.7750(B).

With regard to petitioner's evidentiary challenge, we consider first petitioner's claim that the soil survey and other evidence based on the soil survey are not reliable. The paragraph quoted by petitioner from the introduction to the soil survey is in a section entitled "General Soil Map for Broad Land Use Planning." That paragraph is preceded by the following:

> "The general soil map provides a broad perspective of the soils and landscapes in the survey area. It provides a basis for comparing the potential of large areas for general kinds of land use. Areas that are, for the most part, suited to certain kinds of farming or to other land uses can be identified on the map. Likewise, areas of soils having properties that are distinctly unfavorable for certain land uses can be located." (Emphasis added.) Soil Survey, p.4.

Read together, the two paragraphs clearly indicate that whereas the soil survey general soil map is at too large a scale to be used to site individual structures or roads, or to determine the best management for a particular field, it can be used to make determinations on whether larger areas are suited to uses such as farming or forestry. We conclude it is appropriate for the county to rely on evidence based on the soil survey when determining whether a 120-acre area is suitable for forest use, particularly where, as in this case, there is no evidence that the area does not contain predominantly the soil type indicated by the soil survey.

The evidence submitted by petitioner's geotechnical expert includes testimony that soils on the property are

susceptible to erosion, and that forest use would likely result in increased soil creep or increase the potential for small scale landsliding. Record 383. However, we agree with the county that the geotechnical expert did not testify that this made the property unsuitable for forest uses, but rather that "use of the property for reforestation must carefully consider these conditions." Record 382. Outside of insufficient rate of return on investment, discussed in the preceding section, the only reasons given by petitioner's forestry expert for concluding the property is unsuitable for forest use concern potential limitations on forest practices due to the nearby presence of the UGB and rural residential land. Record 318-319.

There is competent evidence in the record that the subject parcel is similar in soils, slope and terrain to other productive forest lands in northwest Multnomah County. There is also conflicting evidence in the record on whether the subject parcel is generally unsuitable for forest uses. However, considering all the evidence in the record which the parties have cited, including the Davis reports, Geotechnical Resources reports, Department of Forestry letters, 1000 Friends letter and WMS&WCD letter, we do not find that a reasonable decision maker could only believe that the property is generally unsuitable for forest uses.

This subassignment of error is denied.

The seventh assignment of error is denied.[21]

ELEVENTH ASSIGNMENT OF ERROR

> "The findings adopted by the Board [of Commissioners] in support of its conclusion that the land division cannot occur without approval of the RPD improperly construe the applicable law, are not supported by substantial evidence in the whole record; and the action of the Board in initiating review of the land division exceeded the Board's jurisdiction and improperly construed the applicable law."

Petitioner argues that the county's sole basis for denying the proposed land division was its improper denial of the RPD application and, therefore, the denial of the land division should be reversed.

Petitioner's argument under this assignment of error is based on the assumption that the county's denial of the RPD was incorrect and will be reversed or remanded. Our disposition of petitioner's first through seventh assignments of error requires that we affirm the county's denial of the RPD. Therefore, petitioner's argument provides no basis for reversal or remand of the county's

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[21]A local government's denial of a land use development application will be sustained if the local government's determination that any one approval criterion is not satisfied is sustained. Baughman v. Marion County, ___ Or LUBA ___ (LUBA No. 88-117, April 12, 1989), slip op 5-6; Van Mere v. City of Tualatin, 16 Or LUBA 671, 687 n 2 (1988); Weyerhauser v. Lane County, supra. Therefore, because we reject petitioner's challenge to the county's determination that approval of the proposed RPD does not comply with MCC 11.15.7750(B), we do not address petitioner's arguments under the eighth through tenth assignments of error challenging the other bases for the county's denial. Knapp v. City of Jacksonville, supra, slip op at 21 n 10; Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990), slip op 24.

decision to deny the land division.

The eleventh assignment of error is denied.

The county's decision is affirmed.