BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD L. WALTON,	)	
	)	
Petitioner,	)	LUBA No. 90-146
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	

Appeal from Clackamas County.

Richard L. Walton, Milwaukie, filed the petition for review and argued on his own behalf.

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

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

AFFIRMED 04/03/91

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clackamas County hearings officer denying his application to partition land zoned Urban Low Density Residential (R-10) into three parcels.

FACTS

The subject property is developed with a single family residence and two storage structures, consists of 2.55 acres and is zoned R-10. The property is bordered at its southeast corner by S.E. Laurie Ave., a county road. S.E. Laurie Ave. provides the only access to the subject property. S.E. Laurie Ave. approaches the subject property from the south and then curves sharply eastward to pass through a narrow Southern Pacific Railroad trestle underpass.

On August 31, 1989, petitioner filed an application for a minor partition approval with the planning department. On August 17, 1990 the planning department denied petitioner's application and tentative map. Petitioner appealed to the hearings officer. The hearings officer denied petitioner's application and tentative map and this appeal followed.

MOTION TO DISMISS.

We have review authority over "land use decisions." ORS 197.825(1). ORS 197.015(10)(b)(B) states an exception

to our review authority. ORS 197.015(10) provides, in relevant part:

> "'Land Use Decision':
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> "* * * * *
>
> "(b) Does not include a decision of a local government:
>
> "* * * * *
>
> "(B) Which approves, approves with conditions or denies a subdivision or partition, as described in ORS chapter 92, located within an urban growth boundary where the decision is consistent with land use standards; * * *
>
> "* * * * *"

There is no dispute that the subject property is within an urban growth boundary (UGB). There is also no dispute that the challenged decision is one to deny petitioner's application to partition the subject property, and no other approvals were sought. Respondent argues under ORS 197.015(10)(b)(B), and recent decisions of this Board,[1] that we do not have review authority over the challenged decision.[2]

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[1]Southwood Homeowners Assoc. v. City of Philomath, ___ Or LUBA ___ (LUBA No. 90-103, November 15, 1990), rev'd 106 Or App 21 (1991); Meadowbrook Development v. City of Seaside, ___ Or LUBA ___ (LUBA No. 90-060, September 18, 1990); Parmenter v. Wallowa County, ___ Or LUBA ___ (LUBA No. 90-034, June 11, 1990).

[2]Pursuant to OAR 661-10-075(10), petitioner has filed a conditional motion to transfer this appeal proceeding to the circuit court in the event we determine that we lack jurisdiction.

The exception to our jurisdiction provided by ORS 197.015(10)(b)(B) only applies where the challenged decision "is consistent with land use standards." Respondent's motion to dismiss this appeal proceeding predates the decision of the Court of Appeals in Southwood Homeowners Assoc. v. City of Philomath, 106 Or App 21, ___ P2d ___ (1991). As the Court of Appeals explained in Southwood Homeowners, where a decision approving an urban division of land is challenged at LUBA, this Board lacks jurisdiction under ORS 197.015(10)(b)(B) only if the decision is consistent with land use standards. Therefore, before we can determine whether we have jurisdiction in this matter we must first determine whether the challenged decision is consistent with land use standards.

For the reasons explained in our discussion of the second assignment of error, infra, we conclude the challenged decision erroneously applies Clackamas County Zoning and Development Ordinance (ZDO) 1017 and, therefore, it is not consistent with land use standards. Accordingly, the exception to our jurisdiction provided by ORS 197.015(10)(b)(B) does not apply.

Respondent's motion to dismiss is denied.

SECOND ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction, failed to follow procedures applicable to the matter before it in a manner that prejudiced the substantial rights of petitioner, improperly construed the applicable law, made a decision not supported by

> substantial evidence in the whole record, and violated the constitutional provisions cited hereunder by:
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> "Failing to apply the standards in effect at the time the application in question was originally submitted."

Petitioner's second assignment of error alleges the county erroneously applied ZDO 1017 (hereafter referred to as the "solar ordinance") to the proposal in violation of ORS 215.428(3).[3] Petitioner states the solar ordinance was enacted several months after the disputed application was filed with the county.

Respondent agrees the solar ordinance (1) was enacted after petitioner's application was filed, and (2) was applied as a justification to deny the proposal. Respondent agrees with petitioner that the county hearings officer erroneously applied the solar ordinance as a justification for the challenged decision.[4]

The second assignment of error is sustained.

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[3]ORS 215.428(3) provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted." (Emphasis supplied.)

[4]The parties do not dispute that the "solar ordinance" is a "land use standard."

FIRST ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction, failed to follow procedures applicable to the matter before it in a manner that prejudiced the substantial rights of petitioner, improperly construed the applicable law, made a decision not supported by substantial evidence in the whole record, and violated the constitutional provisions cited hereunder by:
>
> "Failing to treat the filing of the Application in a timely manner resulting in a delay of 10-1/2 months until a staff decision was rendered."
>
> ZDO Section 1106.03(B) provides:
>
> "Tentative Map Approval: A final decision on a tentative map shall be made within 30 days of submittal of an application that satisfies the submittal requirements stated in Section 1106.05. The applicant shall be notified, within 10 days of submittal, of any failure to satisfy Section 1106.05."[5]

There is no dispute that the county did not make a final decision within 30 days of the time petitioner submitted his application for tentative map approval.[6]

Respondent contends its failure to issue a final decision on the tentative map within 30 days pursuant to ZDO 1106.05 is a procedural error, and under ORS 197.835(7)(a)(B) we may only reverse or remand the challenged decision on the basis of a procedural error if

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[5]ZDO 1160.05 provides the submittal requirements for tentative map review.

[6]There is also no dispute that petitioner was never notified his application was inadequate to satisfy the requirements of ZDO 1106.05.

such error "prejudiced the substantial rights of the petitioner." Respondent argues petitioner has not established that the failure to issue a timely decision prejudiced his substantial rights.

As we understand it, petitioner does not dispute that the county's failure to comply with ZDO 1106.05 is at most a procedural error. Petitioner argues, however, that the county's failure to make a timely decision on his application caused the land use approval process to extend past the time when real estate sales activity could likely produce the most favorable financial returns.

We agree with the respondent. The prejudice petitioner identifies is speculative. Petitioner has not adequately explained how the county's failure to timely process his application "prejudiced [his] substantial rights."[7]

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The county exceeded its jurisdiction, failed to follow procedures applicable to the matter before

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[7]Additionally, we note that while ZDO 1160.03(B) does not specify the consequences of the county's failure to act in a timely manner on an application for tentative map approval, the consequence of such failure is likely that an applicant has a right to seek a writ of mandamus from the circuit court to compel the county to act. We do not believe the county's failure to act in a timely manner provides a basis for reversal or remand of the challenged decision. Simon v. Board of Co. Comm. of Marion County, 91 Or App 487, 755 P2d 741 (1988) (under ORS 215.428(7), a county's failure to act on a permit application within the 120 day period provided by statute, does not constitute a basis for invalidating the county's decision where the applicant failed to obtain a writ of mandamus before county action was taken).

it in a manner that prejudiced the substantial rights of petitioner, improperly construed the applicable law, made a decision not supported by substantial evidence in the whole record, and violated the constitutional provisions cited hereunder by:

"Making a decision based on hearsay not supported by substantial evidence in the whole record, regarding the design of the roadway improvements."

Under this assignment of error, petitioner claims the evidence in the whole record is not substantial evidence to support the county's determinations that ZDO 1014.03, and the Comprehensive Plan policy regarding "Roadways" are met.[8] We understand petitioner to contend that there is inadequate evidentiary support for the following findings:

"* * * The proposed local road system is not consistent with the design provisions of subsection 1014.03. Specifically, subsection 1014.03(A) requires that entrances and exits for vehicles be designed to encourage smooth traffic flow, with minimum hazard to pedestrians, passing

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[8]ZDO 1014.03 provides in relevant part:

"Entrances and exits for vehicles shall be designed to encourage smooth traffic flow with controlled turning movements and minimum hazards to pedestrians, passing traffic, or to traffic entering or leaving the development.

"* * * * *"

The "Roadways" plan policy provides:

"Provide for the safe, efficient, convenient and economical movement of vehicles while minimizing environmental degradation and conserving energy."

Petitioner does not argue the "Roadways" plan provision and ZDO 1014.03 are not approval standards, and does not challenge the adequacy of the findings to establish those provisions are violated.

> traffic, and to traffic entering or leaving the development. This standard is not, and cannot be met by the applicant's plans. Laurie Avenue, at the subject property, provides inadequate and unsafe access to the development. Laurie Avenue, as it provides access to the property from the east, slopes steeply down and curves under a * * * railroad trestle, and then turns again to the south at the subject property. There is approximately 11 feet of vertical clearance at the railroad underpass (14 feet is the minimum County standard), with approximately 20 feet of width. This clearance does not provide safe emergency or non-typical vehicle access to the subject property. The record establishes that the access does not provide uninterrupted access for emergency vehicles and that two vehicles may not safely pass in the underpass area. The hearings Officer believes the testimony of Ms. Kinman that in 11 years she has never seen two vehicles pass under the trestle at the same time, and that it took the applicant approximately 20 minutes to maneuver the vehicles shown in Exhibit 12. The applicant's proposed improvements will [not] create a safe access.
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> "* * * * *
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> "This [partition] is not consistent with the * * * Roadways Section of the Transportation Element of the Plan. The only Goal of that Section is to provide for the safe, efficient, convenient and economical movement of traffic. * * * Laurie Avenue does not provide safe or efficient access to the subject property and the two additional dwellings proposed to be constructed thereon." Record 3-5.

Petitioner does not dispute that the narrow railroad trestle underpass creates a dangerous situation where the subject property borders S.E. Laurie Ave., as the county determined. Petitioner states:

> "The problem with the trestle is the approach angles on the roadway on each side of the trestle. The existing roadway has a severe 45 degree bend as it joins the trestle that makes it impossible to stay on your side of the roadway when passing under the trestle. This is true on both sides of the trestle." Petition for Review 14.

Petitioner argues there is evidence in the record that he offered to correct this problem with the road angles as follows:

> "The petitioner proposed to construct a 90 foot radius on the outside of the existing roadway to provide an entrance to the trestle that would be parallel with the centerline of the existing roadway as it proceeds under the trestle." Petition for Review 14.

Petitioner cites a memorandum and testimony from Mr. Everson, an employee in the technical services section of the county's Department of Transportation and Development.[9] Petitioner argues this evidence from Mr. Everson so greatly undermines the hearings officers conclusions, that a reasonable person would not rely on the evidence which the county did to determine noncompliance with ZDO 1014.3 and the "Roadways" plan provision. In addition, petitioner states that it is unreasonable to rely on Ms. Kinman's testimony that in 11 years she has never seen two vehicles

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[9]Petitioner relies primarily upon upon Mr. Everson's testimony that "[the road situation] would be tolerable with the addition of two additional homes" (Record 26), and the statement in a memorandum from Mr. Everson that "* * * this office would work with [petitioner] to put together a roadway improvement design and construction to effect the enhancement of the present geometry" (Record 82).

go under the trestle together, because where her house is situated she cannot see the railroad trestle underpass. Petitioner also cites evidence that for as long as the county has kept records there have been no vehicle accidents at the railroad trestle underpass. Petitioner contends this evidence establishes that a reasonable person could not conclude the railroad trestle underpass is a "hazardous intersection," as the hearings officer concluded.

The county argues that petitioner reads too much into the portions of Mr. Everson's testimony upon which petitioner relies. The county contends the portions of Mr. Everson's testimony that petitioner relies upon do not undermine Mr. Everson's testimony read as a whole, or the other evidence in the record supporting the conclusions drawn by the hearings officer. In addition, respondent cites other evidence upon which the hearings officer relied in determining that the proposal does not meet the "Roadways" plan provision and ZDO 1014.03.

In order to overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioner to show there is substantial evidence in the record to support his position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioner['s] evidence should be believed." Morley v. Marion County, 16 Or LUBA 385, 393 (1988); McCoy v. Marion County, 16 Or LUBA

284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). In other words, petitioner must demonstrate that he sustained his burden of proof of compliance with applicable criteria as a matter of law. Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 619 (1989).

We believe there is adequate evidence in the record upon which a reasonable person could rely to reach the conclusions the county did regarding the proposal's compliance with ZDO 1014.03 and the "Roadways" plan provision. Accordingly, petitioner has not sustained his burden of establishing compliance with these provisions as a matter of law.

The third assignment of error is denied.

CONCLUSION

We determined that petitioner's second assignment of error must be sustained because the county erroneously applied the solar ordinance. However, because the challenged decision is one to deny the proposed development, the county need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Garre v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-131, February 27, 1990), aff'd 102 Or App 123 (1990); Douglas v. Multnomah County, ___ Or LUBA

____ (LUBA No. 89-086, January 12, 1990), slip op 16; Baughman v. Marion County, 17 Or LUBA 632, 638 (1989).

Under the third assignment of error, we determine the county's decision that the proposal does not comply with ZDO 1014.03, and the Roadways plan provision, is supported by substantial evidence. These determinations constitute an adequate independent basis for denial of the proposal. Accordingly, the county's decision is affirmed.