



1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the board of  
4 commissioners imposing conditions of approval regarding  
5 access to a proposed single family dwelling on land zoned  
6 for residential use.

7 **MOTION TO INTERVENE**

8 Stephen R. Nobach filed a motion to intervene on behalf  
9 of respondent in this appeal proceeding. Petitioner does  
10 not object to the motion, and it is allowed.

11 **FACTS**

12 The subject property is zoned Residential (R-5) and  
13 consists of approximately 1.17 acres. To the north of the  
14 subject property is the Wedgewood Raleigh Green subdivision,  
15 a large residential development. S.W. 89th Ave. runs north  
16 and south along the subject property and through the  
17 Wedgewood Raleigh Green subdivision. However, S.W. 89th  
18 Ave. is unimproved from the subject property to the north  
19 until it reaches the Wedgewood Raleigh Green subdivision.  
20 South of the subject property, S.W. 89th Ave. is a gravel  
21 road which intersects with S.W. Oleson Rd., an improved  
22 county road.

23 Petitioner applied for permission to construct a single  
24 family dwelling on the subject property. He proposed access  
25 to the dwelling from S.W 89 Ave. to the north, through the  
26 Wedgewood Raleigh Green subdivision, rather than from S.W.

1 Oleson Rd. via S.W. 89th Ave.

2 The county hearings officer rendered an oral decision  
3 approving petitioner's application, and imposing conditions  
4 regarding access to the proposed dwelling which were  
5 somewhat unclear regarding whether access to the parcel was  
6 to be from the Wedgewood Raleigh Green subdivision to the  
7 north or from Oleson Rd. via S.W. 89th Ave. to the south.  
8 Thereafter, the hearings officer issued a written decision  
9 approving petitioner's application. This decision contained  
10 a condition of approval limiting access to the subject  
11 dwelling from S.W. Oleson Rd. via the southerly portion of  
12 S.W. 89th Ave. The hearings officer's written decision also  
13 contained a condition of approval requiring petitioner to  
14 place a street barricade immediately to the north of his  
15 property, barring access to the northerly portion of S.W.  
16 89th Ave., until such time as the county constructs the  
17 portion of S.W. 89th between S.W. Oleson Rd. and the  
18 Wedgewood Raleigh Green subdivision to county road  
19 standards. Petitioner appealed the access and street  
20 barricade condition to the board of commissioners. As  
21 relevant here, the board of commissioners affirmed the  
22 decision of the hearings officer, including the conditions  
23 of approval regarding access and the street barricade. This  
24 appeal followed.<sup>1</sup>

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<sup>1</sup>Petitioner also appealed a condition of approval imposed by the hearing officer's written decision concerning waiver of remonstrance against a

1 **FIRST ASSIGNMENT OF ERROR**

2 "The county exceeded its jurisdiction in that  
3 there is no provision in law that gives the county  
4 the discretion to regulate the direction of  
5 petitioner's access to his property along the  
6 public right of way on which it fronts."

7 Petitioner argues the county lacked authority to impose  
8 the disputed conditions of approval concerning the street  
9 barricade and access to the subject parcel from S.W. Oleson  
10 Rd.

11 The county cites a provision of the Metzger-Progress  
12 Community Plan Area of Special Concern (plan) and Washington  
13 County Community Development Code (CDC) 207-6.1, as  
14 authority to impose conditions of approval on development  
15 located within an area of special concern.

16 The plan "Specific Design Element 2" provides, in  
17 relevant part:

18 "\* \* \* Development of structures \* \* \* within th[e  
19 subject] special area shall be planned and  
20 reviewed under Type III review provisions of the  
21 [CDC]. Because of the importance of trees and  
22 other natural vegetation to the wildlife habitat  
23 and scenery of the community, development shall be  
24 designed to minimize the area disturbed.

25 "\* \* \* \* \* (Emphasis supplied.)

26 CDC 207-6.1 provides, in relevant part:

27 "The Review Authority may impose conditions on any  
28 Type II or III development approval. Such  
29 conditions shall be designed to protect the public

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possible Local Improvement District to improve S.W. 89th Ave. In the challenged decision, the board of commissioners deleted this condition of approval. Record 2.

1 from potential adverse impacts of the proposed use  
2 or development or to fulfill an identified need  
3 for public services within the impact area of the  
4 proposed development. \* \* \*."

5 The plan requires county review of development in the  
6 subject area of special concern under the CDC's Type III  
7 provisions. We see nothing in the plan which would limit  
8 the nature of the Type III review required or the nature of  
9 the conditions which may be imposed pursuant to such Type  
10 III review. We agree with the county that the plan and the  
11 above quoted provisions of CDC 207-6.1 authorize the  
12 imposition of conditions to "protect the public from  
13 potential adverse impacts of the proposed use."

14 The county did not adopt findings in its decision  
15 explaining why it imposed the disputed conditions. There  
16 are no findings identifying the potential adverse impacts of  
17 the proposed development to be minimized or alleviated by  
18 the disputed conditions. Further, there are no findings  
19 explaining how the disputed conditions of approval protect  
20 the public. Although we are aware of no general requirement  
21 that a local government adopt findings justifying its  
22 decision to impose conditions of approval, see e.g.  
23 Vestibular Disorders Consult. v. City of Portland, \_\_\_ Or  
24 LUBA \_\_\_ (LUBA No. 89-112, April 6, 1990), petitioner  
25 clearly raised an issue below concerning whether the county  
26 could properly impose the disputed conditions limiting his  
27 access to S.W. Oleson Rd. via S.W. 89th Ave. Where a  
28 legitimate issue is raised concerning the local government's

1 basis for imposing a disputed condition of approval, the  
2 local government is required to adopt findings addressing  
3 that issue. See Norvell v. Portland Area LGBC, 43 Or App  
4 849, 853, 604 P2d 896 (1979).

5 Nevertheless, this Board does not reverse or remand on  
6 the basis of inadequate findings if any party cites to  
7 evidence in the record to "clearly support" the challenged  
8 decision. ORS 197.835(9)(b).<sup>2</sup> We have reviewed the  
9 evidence cited by the county. In essence, the evidence  
10 cited addresses traffic safety issues at the intersection of  
11 S.W. 89th and S.W. Oleson Road, and to a lesser extent,  
12 traffic safety issues regarding access from the proposed  
13 dwelling through the Wedgewood Raleigh Green subdivision.  
14 However, there is contrary evidence in the record, on which  
15 petitioner relies to support his contentions in another  
16 assignment of error. We do not believe the evidence cited  
17 by the county "clearly supports" a determination that the  
18 disputed conditions will protect the public from potential

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<sup>2</sup>ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1 adverse impacts from the proposed dwelling.<sup>3</sup>

2 The first assignment of error is sustained, in part.

3 **SECOND ASSIGNMENT OF ERROR**

4 "The county erred in refusing to grant a motion  
5 alleging procedural error when, by reversing the  
6 decision of the hearings officer off the record,  
7 it clearly violated its own regulations."

8 Petitioner reads the hearings officer's oral decision  
9 to approve access to his parcel from northerly S.W. 89th  
10 Ave, through the Wedgewood Raleigh Green subdivision.  
11 Petitioner argues that under CDC 207-2 the county was bound  
12 by the hearing's officer's oral decision announced at the  
13 close of the public hearing.<sup>4</sup> Petitioner contends the  
14 hearings officer's subsequent written decision was invalid.  
15 As we understand it, petitioner alleges the county committed  
16 procedural error by failing to recognize the hearings  
17 officer's oral decision.

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<sup>3</sup>Citing Nollan v. California Coastal Commission, 483 U.S. 825, 107 S Ct 3141, 97 L Ed2d 868 (1987), petitioner also argues the disputed conditions of approval are invalid because they are not reasonably related to the purposes articulated in the plan for the "Area of Special Concern" within which the property is located. We disagree with petitioner that the county must establish such a relationship exists between the conditions of approval and the reasons for the establishment of the Area of Special Concern. Here, there is no dispute that there is a relationship between development of a dwelling and the means to be utilized to access such dwelling. This relationship is adequate to withstand petitioner's constitutional challenge.

<sup>4</sup>CDC 207-2 provides:

"If a public hearing has been held, the decision shall be made at the close of the hearing or on a date certain announced at the hearing."

1           The county points out that CDC 209-1<sup>5</sup> as well as  
2   ORS 215.416(10) require a local decision maker to provide  
3   written notice of the decision.   The county argues that CDC  
4   209-1 and 207-2, when read together establish the hearings  
5   officer may render a decision or defer announcing his  
6   decision to a later time, but, in any event, his decision  
7   must be reduced to writing.   The county states it is from  
8   the hearings officer's written decision that an aggrieved  
9   party appeals to the board of commissioners.   Further, the  
10   county argues that in any event the board of commissioners  
11   in this case was aware of both the hearings officer's oral  
12   and written decisions and determined that his written  
13   decision was correct.

14           Finally, the county contends the hearings officer's  
15   oral decision was unclear regarding the access issue, and  
16   that it required clarification before any of the parties  
17   could reasonably understand what access limitation was being  
18   imposed.   According to the county, the hearings officer's  
19   written decision provided that clarity.

20           We assume for purposes of this assignment of error,

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<sup>5</sup>CDC 209-1 provides, in relevant part:

"A decision of the Review Authority may be appealed only if  
within fourteen (14) calendar days after written notice of the  
decision is provided to the parties[:]"

"A party files a complete petition for review with the  
Director[.]"

"\* \* \* \* \*"

1 that the hearings officer's oral decision can be reasonably  
2 construed as approving access from S.W. 89th Ave. through  
3 the Wedgewood Raleigh Green subdivision to the north, and  
4 that the written decision does not. Petitioner  
5 characterizes the alleged error as a procedural error. We  
6 do not reverse or remand on the basis of procedural errors  
7 below unless they cause prejudice to the substantial rights  
8 of the parties. ORS 197.835(7)(a)(B).<sup>6</sup> Petitioner does  
9 not argue he was not allowed to present evidence and  
10 argument to the board of commissioners to explain why the  
11 hearings officer's oral decision should prevail over his  
12 written decision. Petitioner has not established how this  
13 alleged procedural error affected his substantial rights.  
14 Absent an explanation of how substantial rights are  
15 prejudiced, this Board will not reverse or remand on the  
16 basis of procedural error. Holladay Investors, Ltd. v. City  
17 of Portland, 18 Or LUBA 188, aff'd 100 Or App 551 (1990).

18 The second assignment of error is denied.

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<sup>6</sup>ORS 197.835(7)(a)(B) provides:

"\* \* \*the [Land Use Board of Appeals] shall reverse or remand  
the land use decision under review if it finds:

"(a) The local government \* \* \*

"\* \* \* \* \*

"(B) Failed to follow the procedures applicable to the  
matter before it in a manner that prejudiced the  
substantial rights of the petitioner \* \* \*"

1 **THIRD ASSIGNMENT OF ERROR**

2 "The county erred in failing to base its decision  
3 on substantial evidence in the whole record. The  
4 decision has no legal foundation and appears to  
5 have been reached not as a result of legal  
6 reasoning, but of bias and interest."

7 Petitioner challenges the evidentiary support for the  
8 conditions of approval concerning access and the street  
9 barrier. We determine, supra, that the findings supporting  
10 those conditions are inadequate. No purpose is served in  
11 reviewing the evidentiary support for inadequate findings.  
12 DLCD v. Josephine County, 18 Or LUBA 88, 94 (1990); DLCD v.  
13 Columbia County, 16 Or LUBA 467, 471 (1988); McNulty v. City  
14 of Lake Oswego, 14 Or LUBA 366, 373 (1986).

15 In this assignment of error, petitioner also argues the  
16 board of commissioners and staff were biased against his  
17 interests, and acted favorably toward those who opposed  
18 petitioner's requested means of access to the dwelling.

19 Petitioner claims:

20 "Petitioner has met [his] burden [of establishing  
21 bias] by default as there is no other reasonable  
22 basis for the decision. It seems clear that  
23 someone within the County organization is  
24 controlling the outcome. \* \* \*" Petition for  
25 review 28.

26 In order to establish a claim of bias sufficient to  
27 result in reversal or remand of the challenged decision,  
28 petitioner is required to clearly demonstrate that the  
29 public officials charged with bias are incapable of making a  
30 decision on the basis of the evidence and argument

1 presented. 1000 Friends of Oregon v. Wasco County, 304 Or  
2 76, 742 P2d 39 (1987); Schneider v. Umatilla County, 13 Or  
3 LUBA 281 (1985). We do not believe petitioner has carried  
4 that burden here.

5 The third assignment of error is denied.

6 **FOURTH ASSIGNMENT OF ERROR**

7 "The county erred in failing to recognize that  
8 when petitioner purchased his property fronting on  
9 an unplugged public right of way in 1986 without  
10 knowledge of any provisions that would restrict  
11 his access, he acquired a vested right to approach  
12 his property from the north. In addition, if  
13 petitioner is limited to approaching his property  
14 from the south, he will be denied equal protection  
15 of the law in that he is being treated differently  
16 than similarly situated property owners."

17 In this assignment of error, petitioner argues he has a  
18 vested right to access the proposed dwelling across S.W.  
19 89th Ave. through Wedgewood Raleigh Green subdivision to the  
20 north. He also suggests the county is estopped to deny him  
21 the access he desires.

22 The county states that under ORS 197.825(2) and  
23 ORS 197.763(1), this Board may only review those issues  
24 which were raised below with sufficient specificity to  
25 enable the county to respond.<sup>7</sup> The county argues petitioner

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<sup>7</sup>ORS 197.835(2) limits this Board's scope of review as follows:

"Issues shall be limited to those raised by any participant  
before the local hearings body as provided by ORS 197.763.  
\* \* \*"

ORS 197.763(1) provides

1 did not raise below the issue of whether he had a vested  
2 right to access via S.W. 89th Ave through the Wedgewood  
3 Raleigh Green subdivision, or whether the county is estopped  
4 to deny him such access. According to the county, under  
5 these circumstances we may not review whether petitioner  
6 possesses a vested right to, or whether the county is  
7 estopped to deny, the access petitioner desires to the  
8 proposed dwelling.

9 Petitioner cites nothing in the record to show these  
10 issues were raised below. Accordingly we do not review  
11 whether petitioner has a vested right to access through the  
12 Wedgewood Raleigh Green subdivision, or whether the county  
13 is estopped to deny such access. ORS 197.825(2).

14 Finally, petitioner makes a nonspecific undeveloped  
15 argument that the challenged decision denies him "equal  
16 protection." However, we have stated on many occasions that  
17 an undeveloped claim of unconstitutionality is an  
18 insufficient basis for this Board to reverse or remand a  
19 challenged decision. Walker v. City of Beaverton, 18 Or  
20 LUBA 712 (1990); Constant v. Lake Oswego, 5 Or LUBA 311  
21 (1982).

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"An issue which may be the basis for an appeal to the board shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

- 1 The fourth assignment of error is denied.
- 2 The county's decision is remanded.