BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DON H. JOYCE, Petitioner, vs. MULTNOMAH COUNTY, Respondent, and ARNOLD ROCHLIN, Intervenor-Respondent.	LUBA No. 91-220
	FINAL OPINION AND ORDER

Appeal from Multnomah County.

James F. Hutchinson, Portland, filed the petition for review and argued on behalf of petitioner.

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

Arnold Rochlin, Portland, filed a response brief and argued on his own behalf.

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

AFFIRMED 04/09/92

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 challenges a Multnomah County Board of Commissioners order denying conditional use approval for a nonresource dwelling.

MOTION TO INTERVENE

Arnold Rochlin moves to intervene in this proceeding on the side of respondent. There is no opposition, and the motion is allowed.

FACTS

Petitioner owns a 0.66 acre parcel zoned Multiple Use Forest - 19 Acre Minimum (MUF-19). The subject parcel is located on the west side of McNamee Road, approximately 3/4 mile south of Highway 30, and is surrounded by other MUF-19 zoned land. Except for an adjoining 0.93 acre parcel, the surrounding parcels (ranging in size from less than an acre to over 60 acres) are owned by Agency Creek Management Company and are in commercial forest use. The surrounding land and, by mistake, the subject parcel itself were clearcut approximately a year ago.[1] The surrounding land has been replanted with fir seedlings.

There are nine nonresource dwellings within one mile of the subject parcel. Only one is on land zoned MUF-19, located along Highway 30. The remainder are on Rural

[1]The record indicates petitioner settled a claim for timber trespass based on this clearcutting. Record 16.

Residential (RR) zoned land, and are located approximately 1/4 to 3/4 mile to the southwest of the subject parcel.

On May 7, 1991, petitioner applied for conditional use approval for a nonresource dwelling on the subject parcel. After a public hearing, the county planning commission denied the application. On September 23, 1991, petitioner filed a notice of review to the board of commissioners. Record 37. The notice of review was accompanied by exhibits which included several photographs of homes or building sites, a map and petitioner's affidavit explaining that the locations shown in the photographs are depicted on the map. Record 27-35, 42-43.

The board of commissioners conducted a de novo evidentiary hearing on October 22, 1991, at the conclusion of which it made a tentative oral decision to deny the application. On November 1, 1991, petitioner requested "reconsideration" because the above mentioned map and photographs allegedly "were not provided to the [board members] for review prior to and during the applicant's appeal presentation" at the October 22, 1991 hearing. Record 12. The board of commissioners did not reopen the hearing. On November 26, 1991, the board of commissioners adopted the challenged order denying petitioner's application.

DUE PROCESS

Under the heading "Denial of Due Process," petitioner

argues:

> "By denying Petitioner's application without considering all of the evidence submitted by Petitioner, and by later refusing to allow Petitioner to present said evidence with [an adequate opportunity] to explain its importance, [respondent] has denied Petitioner his right to use his property, without due process of law. This action is a violation of the Fourteenth Amendment of the United States Constitution." Petition for Review 12.

At oral argument, petitioner explained that the "evidence" referred to in the above quote is the map and photographs submitted with petitioner's notice of review, and which petitioner contends the county commissioners failed to review.

This Board has stated on numerous occasions that it will not consider claims of constitutional violations where the parties raising such claims do not supply legal argument in support of those claims. Torgeson v. City of Canby, 19 Or LUBA 511, 519 (1990); Van Sant v. Yamhill County, 17 Or LUBA 563, 566 (1989); Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 165-66 (1985); Mobile Crushing Company v. Lane County, 11 Or LUBA 173, 182 (1984). Accordingly, we decline to consider petitioner's unsupported claim of denial of due process.[2]

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[2]We note, however, that petitioner's request for "reconsideration" states that the map and photographs accompanying petitioner's notice of review were "frequently referred to" in petitioner's oral testimony before the board of commissioners. Record 12. Petitioner also concedes that the original map and photographs were present in the hearing room, in the

SECOND ASSIGNMENT OF ERROR

> "The County's decision denying Petitioner's land use approval for conditional use permit was not supported by substantial evidence in the whole record."

Multnomah County Code (MCC) 11.15.2172(C)(3) establishes the following approval standard for nonresource dwellings in the MUF-19 zone:

> "[The] dwelling, as proposed, is compatible with the primary uses as listed in MCC 11.15.2168 on nearby property and will not interfere with the resources or the resource management practices or materially alter the stability of the overall land use pattern of the area."

The county concluded:

> "[T]he proposal does not satisfy all approval criteria [as] required by MCC 11.15.2172(C). The * * * proposal is incompatible with the commercial forest uses of the surrounding area. All of the property within the 500 foot notification area, with the exception of the 0.93 acre parcel noted above and a 0.54 acre parcel in the ownership of Portland General Electric, are in one single ownership and managed for commercial forestry purposes. [D]evelopment of this 0.66 acre parcel with a non-resource related single family residence, only 30 feet from commercial forest properties, would alter the stability of the commercial forest land use pattern of the surrounding area." Record 8.

Petitioner argues the above quoted determination of noncompliance with MCC 11.15.2172(C)(3) is not supported by

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custody of the county planner, during the board of commissioners' hearing, and that petitioner has no knowledge that copies of these documents were not provided to the individual board members in their appeal packets for the October 22, 1991 hearing. It is therefore difficult to understand the basis for petitioner's contention that he was denied an adequate opportunity to present his evidence.

substantial evidence in the record. Petitioner concedes the primary use of the land surrounding the subject parcel is commercial forestry. However, petitioner argues his own testimony and that of a county planner establish that the conflicts between the proposed dwelling and timber management practices on surrounding property would be minimal, and that the overall land use pattern in the area is mixed residential and resource uses.[3] Petitioner also argues that contrary testimony by intervenor and another individual was controverted by that of the county planner

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[3]To the extent petitioner also argues the county's decision is not supported by substantial evidence because the board of commissioners failed to review the map and photographs which petitioner contends demonstrate that the overall land use pattern of the area is mixed resource and residential, we note the only evidence cited by petitioner to support this contention is a November 6, 1991 letter from a county planner responding to petitioner's request for "reconsideration" as follows:

> "We will recommend to the Board [of Commissioners] that [it] not reconsider the matter. * * * The evidence you refer to in your letter of November 1 was available at the hearing, as was the entire case file. You made reference to that evidence in your presentation before the Board, thereby, making it a part of the record. All parties had the opportunity to examine the file if they desired. Therefore, we do not feel that [petitioner] was denied a fair consideration of his position." Record 11.

We have previously stated the local decision maker is not required to demonstrate that it considered all evidence in the record. Angel v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-192, February 14, 1992), slip op 6; Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 755, 765 (1988). Rather, the burden is on petitioner to establish that the board members failed to consider the evidence in the record. See Toth v. Curry County, ___ Or LUBA ___ (LUBA No. 91-070, December 20, 1991), slip op 9-10. Petitioner fails to do so. The above quoted letter was written almost three weeks before the board of commissioners adopted its final decision and, in any case, does not purport to state that the county commissioners had not considered petitioner's map and photographs.

and petitioner.

In challenging the county's determination of noncompliance with MCC 11.15.2172(C)(3) on evidentiary grounds, 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 the applicable standard 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 have reviewed the evidence in the record cited by the parties. Record 15-16, 27-35, 42-43, 83-85, 89-89a, 94, 111-13. That evidence shows that the proposed dwelling would be located on a 0.66 acre parcel surrounded by land zoned MUF-19 and almost exclusively in one commercial forest ownership. It would not be possible for the proposed dwelling to comply with the county's desired 200 foot set back from adjoining commercial forest uses.[4] There is

[4]With certain exceptions not relevant here, MCC 11.15.2172(C)(5) requires nonresource dwellings in the MUF-19 zone to have "building

conflicting evidence as to the impacts of the surrounding commercial forest operations and the proposed dwelling on each other. The only other nonresource dwelling in the area on land zoned MUF-19 is a dwelling which predates the MUF-19 zoning and is located at the corner of McNamee Road and Highway 30. The other nonresource dwellings to the southwest of the subject parcel, indicated on petitioner's maps and photographs, are in an RR zoned area, and are on parcels significantly larger than the subject parcel. There is conflicting evidence as to the effect of the proposed dwelling on the stability of the existing land use pattern.

The choice between conflicting believable evidence belongs to the local government decision maker. Wissusik v. Yamhill County, ___ Or LUBA ___ (LUBA No. 90-050, November 13, 1990), slip op 19; Vestibular Disorder Consult. v. City of Portland, 19 Or LUBA 94, 103 (1990). In this case, we cannot say a reasonable decision maker could only believe the evidence relied on by petitioner.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "The County, by denying Petitioner's conditional use permit, in violation of Article I, Section 18 of the Oregon Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution took, without payment of just compensation, the private property of Petitioner by rendering it useless by disallowing the only

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setbacks of at least 200 feet * * * from all property lines, wherever possible[.]" (Emphasis added.)

economically feasible use * * *."

Petitioner contends the county's decision to deny a conditional use permit for a nonresource dwelling on the subject property is a "taking" without just compensation in violation of the Oregon and United States Constitutions. Petitioner argues there is uncontroverted evidence in the record that there is no other economically viable use for the subject parcel. Record 14, 43.

In Dolan v. City of Tigard, ___ Or LUBA ___ (LUBA No. 90-029, January 24, 1991), slip op 14-18, we explained that constitutional "taking" claims are not ripe for adjudication, under either the Oregon or United States Constitution, if a property owner has not used available administrative procedures to seek development approval for the subject property. We specifically noted that Oregon appellate courts have required property owners to seek quasi-judicial plan and zone map amendments and potentially available conditional use permits before pursuing claims that local regulations effect an unconstitutional "taking" of their property. Fifth Avenue Corp. v. Washington County, 282 Or 591, 614-21, 581 P2d 50 (1978); Dunn v. City of Redmond, 86 Or App 267, 270, 739 P2d 55 (1987); see also Sabin v. Clackamas County, ___ Or LUBA ___ (LUBA No. 90-077, September 19, 1990), slip op 17-18. We concluded in Dolan that a property owner must seek relief through available variance processes before pursuing either a federal or state

regulatory taking claim.

Here, petitioner has sought neither quasi-judicial plan and zone map amendments, variances nor conditional use approval for uses other than a nonresource dwelling.[5] Rather, petitioner asks us to find that he is not required to seek relief through such processes, and to conclude a taking exists, because according to petitioner, the record establishes that there is no economically viable use for the subject parcel other than the proposed nonresource dwelling. However, the only evidence in the record cited in support of petitioner's contention consists of statements by petitioner and his attorney that the parcel is not suited for any use other than a nonresource dwelling. Such unsupported assertions are not a sufficient basis for excusing petitioner from the requirement that he seek approval for other permitted or conditional uses potentially allowed in the MUF-19 zone before pursuing a taking claim. Further, even if petitioner's contention that the subject parcel can only be used for a nonresource dwelling were correct, that would not excuse petitioner from the requirement of seeking a quasi-judicial plan and zone map amendment prior to

[5]For instance, other conditional uses allowable in the MUF-19 zone include community service uses, commercial processing of forest products, feed lots, raising fowl, swine or fur-bearing animals, and dog kennels. MCC 15.22.2172(B).

pursuing a taking claim.[6]

Because petitioner has not pursued relief potentially available through approval of other uses under the existing MUF-19 zone, or quasi-judicial plan and zone map amendments, petitioner's state and federal taking claims are not ripe for review.

The first assignment of error is denied.

The county's decision is affirmed.

[6]We realize that such plan and zone map amendments might also require exceptions to one or more Statewide Planning Goals. However, such goal exceptions are similar in nature to variances and, like variances, must be sought before a taking claim is ripe.