BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RODGER STOCKWELL and JEANNE STOCKWELL,	)	
Petitioners,	)	LUBA No. 92-144
vs.	)	FINAL OPINION AND ORDER
CLACKAMAS COUNTY,	)	
Respondent.	)	

Appeal from Clackamas County.

Greg McKenzie, Oregon City, filed the petition for review and argued on behalf of petitioners.

Gloria Gardiner, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 12/18/92

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

Petitioners appeal an order of the county hearings officer denying their application for a temporary permit to allow the continuation of a woodworking business not otherwise allowed by the applicable zone.

FACTS

The subject property is 6.39 acres in size and is zoned Exclusive Farm Use (EFU-20). There is a barn on the subject property, in which petitioners have conducted their woodworking business. Petitioners seek the temporary permit to allow their business to continue to operate through January 1, 1993. The hearings officer denied petitioners' request for the temporary permit, and this appeal followed.

ASSIGNMENTS OF ERROR

Petitioners argue the challenged decision denying the temporary permit is based on inadequate findings, and is not supported by substantial evidence in the whole record.

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, 18 Or LUBA 877, aff'd 102 Or App 123 (1990); Baughman v. Marion County, 17 Or LUBA 632, 638 (1989). Further, 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 petitioners to show there is substantial evidence in the record to support their position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed." Morley v. Marion County, 16 Or LUBA 385, 393 (1987); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). Petitioners must demonstrate they sustained their 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).

One of the relevant standards, which the hearings officer determined the proposal did not satisfy, is Clackamas County Zoning and Development Ordinance (ZDO) 1204.01(D).[1] The hearings officer determined:

> "The record establishes that this use is detrimental to surrounding properties. The business produces noise during lengthy working days, traffic safety problems and sawdust which are detrimental to surrounding properties. The sawdust production also appears to be in violation of [Department of Environmental Quality (DEQ)] air contaminant discharge standards. There are no identified conditions which could adequately

[1]ZDO 1204.01(D) requires the following:

> "The temporary use will not be detrimental to the area or to adjacent properties[.]"

> mitigate these impacts. The applicant has testified that he cannot afford to install a sawdust trap system at this location similar to the one he will install at his new business location." Record 3.

These findings are adequate to establish the proposal fails to comply with ZDO 1204.01(D).[2]

There is evidence in the record that petitioners' woodworking business manufactures cedar planters and wood garden products as well as oak furniture, boxes and hardwood molding. There is evidence that the business employs 8-15 people, in addition to petitioners, and that the hours of operation are from 7:00 a.m. to approximately 8:30 p.m. during the week and 7:00 a.m. to 3:30 p.m. on Saturdays and occasional Sundays. The record establishes that various kinds of machinery are used in the conduct of the business including a molder, rip saw, chop saw, table saws, and radial arm saws, and there is evidence that the business generates a significant amount of sawdust and noise. Further, there is evidence the sawdust from the operation of the business is not contained, but rather is allowed to blow outside onto a pile in the yard. There is evidence that the sawdust drifts onto a neighbor's property and covers his cars, and that the noise from the operation of the business

[2]Petitioners complain about the county's reference to the "apparent" violation of DEQ standards. However, these findings are adequate to establish the proposal fails to comply with ZDO 1204.01(D) regardless of whether the business also violates DEQ air contaminant discharge standards.

is heard within a neighboring residence. Finally, there is evidence that trucks deliver lumber to the subject property and sometimes unload lumber in the street, blocking traffic. Petitioners have failed to establish as a matter of law, that their proposal satisfies ZDO 1204.01(D).

One further point merits comment. Petitioners argue the hearings officer erred by applying to the proposal certain DEQ administrative rule provisions regarding air contaminant discharge. Specifically, petitioners contend the hearings officer is required to provide notice of the standards he intends to rely upon, and that he failed to provide such notice regarding the DEQ rule provisions.

First, we believe the hearings officer's reference to the DEQ administrative rules is not necessary to the challenged decision, and is therefore surplusage. Consequently, that there may have been inadequate notice of these standards provides no basis for reversal or remand. However, we note that there is another reason why petitioners' allegation in this regard provides no basis for reversal or remand of the challenged decision.

In its brief, the county responds to petitioners' allegation, as follows:

> "At the end of the [May 27, 1992] hearing, the Hearings Officer announced that he would take official notice of the Oregon Administrative Rules regarding DEQ emissions standards * * *. Petitioners did not object on the record to this [official] notice of law. Instead, their attorney asked that the record be kept open for seven days

> for petitioners to submit written comments on the DEQ rules * * *. The Hearings Officer agreed to leave the record open until June 3 for any person to submit information on the impact of the DEQ rules on petitioners' business. * * * On June 2, 1992 petitioners did submit their written opinion on the applicability of OAR chapter 340, division 21, which they specifically cited. * * *" Respondent's Brief 14.

The error petitioners allege is procedural in nature. Under ORS 197.835(7)(a)(B), this Board may only reverse or remand an appealed decision on procedural grounds if the error caused prejudice to petitioners' substantial rights. As explained in the quoted portion of the county's brief, petitioners were in fact provided an opportunity to respond to the DEQ rules regarding air contaminant discharge. Therefore, to the extent the county committed error, it did not prejudice petitioners' substantial rights.

Petitioners' assignments of error are denied.

The county's decision is affirmed.