BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF TRANSPORTATION, Petitioner, vs. CLACKAMAS COUNTY, Respondent, and TERRY W. EMMERT, Intervenor-Respondent.	LUBA No. 93-218 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Lucinda D. Moyano, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief were Theodore R. Kulongoski, Attorney General; and Thomas A. Balmer, Deputy Attorney General.

Michael E. Judd, Chief Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

Frank G. Patrick, Clackamas, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 04/19/94

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 county decision approving a comprehensive plan map amendment from Low Density Residential to Medium Density Residential and a corresponding zone change from Low Density Residential (R-8.5) to Medium Density Residential (MR-1).

MOTION TO INTERVENE

Terry W. Emmert, the applicant below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO EXCLUDE EVIDENCE

Petitioner moves to exclude a warranty deed attached as Appendix A to intervenor's brief. Petitioner also moves to exclude certain statements of fact in intervenor's brief concerning access to the subject property and the ownership and development of adjacent property. Petitioner argues this evidence must be excluded because it is not part of the local record.

Except in circumstances not applicable here, our review is limited to the local record submitted by the county. ORS 197.830(13)(a). Although LUBA is authorized to take official notice of judicially cognizable law, as set out in Oregon Evidence Code Rule 202, LUBA does not have authority to take official notice of adjudicative facts. Fleck v. Marion County, 25 Or LUBA 745, 753 (1993); Blatt v. City of

Portland, 21 Or LUBA 337, 342, aff'd 109 Or App 259 (1991). The warranty deed attached to intervenor's brief is not included in the local record and does not constitute judicially cognizable law of which this Board may take official notice.

Petitioner's motion to exclude Appendix A of intervenor's brief is allowed. The Board shall disregard any statements in intervenor's brief that are not supported by evidence in the record.

FACTS

This is the second time a county decision approving the subject plan amendment and zone change has been appealed to this Board. In ODOT v. Clackamas County, 23 Or LUBA 370, 372 (1992) (ODOT I), we described the relevant facts as follows:

> "The subject property is an undeveloped parcel consisting of 14.07 acres. The property abuts a partially developed single family residential [zoned] subdivision to the north and industrially zoned property to the south. Both the subdivision and the industrially zoned property are owned and were developed by intervenor-respondent, the owner of the subject property and the applicant below. State Highway 212 adjoins the southern boundary of the industrially zoned land.
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> "Intervenor wishes to redesignate and rezone the subject property to enable multifamily residential development. Clackamas County Comprehensive Plan (plan) Medium Density Residential policy 19.0 requires that land designated Medium Density Residential have access to a major or minor arterial or collector street. Intervenor proposes to provide access to multifamily residential

> development on the subject property by constructing a road through his industrially zoned property to connect to State Highway 212. Intervenor proposes this means of access because the subject property is landlocked due to intervenor's prior developments described above. Intervenor's partially developed single family residential subdivision to the north has no streets platted to serve development on the subject property. In addition, there are no arterial or collector streets in the vicinity of the subject property, other than State Highway 212, to serve the subject property."

In ODOT I, we remanded the county's first decision because it failed to demonstrate compliance with Statewide Planning Goals 6, 7, 11, 12 and 13 and the plan Transportation Goal. On remand, an additional public hearing was held before the board of county commissioners, after which the decision challenged here was adopted.

FIRST ASSIGNMENT OF ERROR

The county decision challenged in ODOT I conditioned approval of the subject plan amendment and zone change on intervenor securing "access to a roadway of arterial or collector status." Record I 3.[1] The county's findings simply relied on this condition to establish compliance with Goal 12 (Transportation). In ODOT I, 23 Or LUBA at 376-77, we stated that reliance on such a condition

> "* * * fail[s] to establish that the transportation systems affected by the proposed plan map amendment for the subject property will

[1]We cite the local record submitted in ODOT I as "Record I" and the local record developed after remand as "Record II."

> be safe and adequate. Simply conditioning the approval of the proposal upon the securing of safe and adequate transportation is not the equivalent of determining the proposed plan amendment is consistent with Goal 12."

The decision challenged here imposes the same condition, but includes the following findings:

> "* * * The evidence presented by [intervenor] demonstrates the requested re-zoning of this property will not result in an increase of traffic on Hwy. 212, which will be the required access for any development. Approval of this application is, therefore, consistent with Goal 12." Record II 2.

Petitioner contends these findings are inadequate to demonstrate compliance with Goal 12 and are not supported by substantial evidence in the whole record.[2]

As a preliminary matter, we point out there are essentially two ways that the county could show the proposed amendment to its acknowledged comprehensive plan and zoning map complies with Goal 12. First, the county could establish that there is a safe and adequate transportation system to serve Medium Density Residential development of the subject property. Second, the county could establish that development of the subject property under the Medium Density Residential plan designation and MR-1 zone will not

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[2]In its argument, petitioner also refers to OAR 660-12-060, part of the Department of Land Conservation and Development's Transportation Planning Rule. However, in ODOT I, 23 Or LUBA at 375, we determined that under ORS 197.763(1) and 197.835(2), petitioner waived the issue of compliance with this rule. Consequently, we do not consider petitioner's arguments concerning compliance with OAR 660-12-060.

create greater or different transportation demands and impacts than development under the existing, acknowledged Low Density Residential designation and R-8.5 zone. See McInnis v. City of Portland, ___ Or LUBA ___ (LUBA No. 93-135, March 3, 1994), slip op 13 (plan and zone amendments which lessen the impacts or demands that goal standards were adopted to address are likely to be consistent with those goal standards); Sokol v. City of Lake Oswego, 18 Or LUBA 375, 391 (1989), aff'd 100 Or App 494 (1990)

The challenged decision takes the latter course. In this case, this means the county's findings must address, and be supported by substantial evidence regarding, two issues. First, the decision and supporting evidence must show that development of the subject property under the MR-1 zone will not generate a greater amount of traffic than development under the acknowledged R-8.5 zone. Second, because the county plan requires that the subject property have direct access onto Hwy. 212, if it is developed under MR-1 zoning, the decision and supporting evidence must show that if the subject property were developed under the acknowledged R-8.5 zoning, it would also have direct access onto Hwy. 212.[3]

[3]Petitioner also argues it will likely deny intervenor's future application for an ODOT state highway access permit for direct access onto Hwy. 212 from the subject property, regardless of the property's plan and zone designation. However, petitioner does not contend it is legally impossible for intervenor to obtain such a permit. Additionally, we do not see how this argument relates to the compliance of the proposed plan

A. Traffic Generation

The county finding that the proposed plan amendment and zone change "will not result in an increase of traffic on Hwy. 212" is supported by the report and testimony of a traffic engineer. Record II 9, 57-102. Petitioner argues the traffic engineer's conclusion depends on an assumption that MR-1 zoning will permit 118 apartment units to be developed on the subject property. Record II 62. Petitioner contends that assumption is undermined by testimony from the county planning staff that the base density in the MR-1 zone is 12 units per acre. Record I 19. According to petitioner, this means the subject 14.07 acre property should accommodate 168, not 118, apartment units and, therefore, the traffic engineer's conclusions "as to the amount of traffic generated from the property if zoned MR-1 are highly suspect."[4] Petition for Review 7.

We are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in

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amendment and zone change with Goal 12. The county has chosen to demonstrate compliance with Goal 12 by showing that development under the proposed plan and zone designations will have no greater or different transportation impacts than development under the acknowledged plan and zone designations. That petitioner may ultimately deny intervenor a state highway access permit does not establish that the access to the subject property would be different if the property is developed under MR-1 zoning, as opposed to R-8.5 zoning.

[4]Petitioner also points out the 253 apartment figure relied on by the traffic engineer for development of this 14.07 acre property under the Medium High Density Residential (MR-2) zone is, in contrast, consistent with planning staff testimony that the base density in the MR-2 zone is 18 units per acre. Id.

the whole record." ORS 197.835(7)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In evaluating the substantiality of evidence in the whole record, we are required to consider whether supporting evidence is refuted or undermined by other evidence in the record, but cannot reweigh the evidence. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992).

A local government may rely on the opinion of an expert in making a determination of whether a proposal satisfies an applicable standard. Thormahlen v. City of Ashland, 20 Or LUBA 218, 236 (1990). Additionally, it is not required that an expert witness explain the basis for all assumptions that underlie the expert's evidence, or that evidence supporting the assumptions made by the expert be included in the record. Citizens for Resp. Growth v. City of Seaside, ___ Or LUBA ___ (LUBA No. 93-163, January 31, 1994), slip op 9; Miller v. City of Ashland, 17 Or LUBA 147, 170 (1988); see Hillsboro Neigh. Dev. Comm. v. City of Hillsboro, 15 Or LUBA 426, 432 (1987). The substantial evidence standard of ORS 197.835(7)(a)(C) requires only that, considering all the

relevant evidence in the record, a reasonable person could have chosen to rely on the expert's conclusions.[5]

In this case, we do not believe the planning staff member's statement that the base densities of the MR-1 and MR-2 zones are 12 and 18 units per acre, respectively, so undermines the traffic engineer's reliance on a figure of 118 apartments for the amount of development allowed on the subject property under the MR-1 zone, that the county decision maker's reliance on the traffic engineer's expert conclusions regarding traffic generated from development of the subject property is unreasonable. There could be many reasons why future development of the subject property might not achieve one hundred per cent of that allowed by the base density in the MR-1 zone. In the absence of a specific challenge below with regard to the accuracy of or basis for the figure of 118 apartments on the subject property under MR-1 zoning, we cannot say the county decision maker's reliance on the report and testimony of intervenor's traffic engineer is unreasonable.

This subassignment of error is denied.

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[5]Of course, we recognize that if sufficient evidence undermining an expert's assumptions is submitted during the local proceedings, it may be unreasonable for the local decision maker to rely on that expert's conclusions. In such instances, the local government's decision has a better chance of withstanding a substantial evidence challenge made in an appeal to LUBA if the record includes an explanation of, or evidence supporting, the expert's assumptions.

B. Direct Access Onto Hwy. 212

There is no dispute that under the county plan, development of the subject property under MR-1 zoning will require direct access onto Hwy. 212. Petitioner argues such access will be unsafe and will adversely impact the function of Hwy. 212. Petitioner further argues that if the property were developed under the existing R-8.5 zoning, access could be provided from local streets in the residential development to the north, and the adverse impacts of direct access onto Hwy. 212 avoided.

If the county wishes to establish compliance of the proposed plan amendment and zone change with Goal 12, without specifically demonstrating that direct access from future MR-1 residential development on the subject property onto Hwy. 212 is safe and adequate, it must explain in its decision why there would be direct access onto Hwy. 212 from future residential development on the subject property under the existing, acknowledged R-8.5 zoning. The challenged decision apparently assumes that direct access to the subject property from Hwy. 212 would also be provided under R-8.5 zoning, but does not explain the basis for that assumption.[6]

This subassignment of error is sustained.

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[6]Because the county's findings do not address this issue, we do not consider petitioner's argument that the record does not contain substantial evidence to support the necessary findings.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the challenged decision fails to satisfy three relevant county comprehensive plan provisions.

A. Roadways Goal

Petitioner contends the plan Roadways Goal is not met for the same reasons Goal 12 is not satisfied.

As we explained in ODOT I, 23 Or LUBA at 379, the plan Roadways Goal is nearly identical to Goal 12.[7] Consequently, the challenged decision fails to comply with the Roadways Goal for the same reason that it fails to comply with Goal 12.

This subassignment of error is sustained.

B. Table V-1 and Residential Policy 30.0

Petitioner argues the challenged decision fails to demonstrate compliance with the access limitations for major arterials identified on plan Table V-1 (Roadway Classifications and Guidelines). Petitioner also argues the decision does not demonstrate compliance with plan Residential Policy 30.0(b), which requires that areas designated Medium High Density Residential have access to a major or minor arterial or collector street.

The county argues petitioner failed to raise compliance

[7]In ODOT I, we referred to the plan Roadways Goal as the plan Transportation Goal.

with plan Table V-1 or Residential Policy 30.0 as issues in ODOT I and that these plan provisions were not bases for our remand in ODOT I. The county contends petitioner has therefore waived these issues and may not raise them for the first time in this appeal. We agree with the county.[8] Beck v. City of Tillamook, 313 Or 148, 152-53, 157, 831 P2d 674 (1992); Adler v. City of Portland, 25 Or LUBA 546, 552 (1993).

This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

ZDO 1202.01B establishes the following approval criterion for zone changes:

> "The property and affected area is presently provided with adequate public facilities, services and transportation networks to support the use, or such facilities, services and transportation networks are planned to be provided concurrently with the development of the property."

Petitioner contends the challenged decision fails to comply with ZDO 1202.01B.[9]

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[8]The challenged decision amends the plan map designation for the subject property to Medium Density Residential, not Medium High Density Residential. Petitioner probably intended to cite Residential Policy 19.0(b), which imposes the same access requirement on Medium Density Residential designated areas that Residential Policy 30.0(b) imposes on Medium High Density Residential designated areas. However, neither Residential Policy 19.0(b) nor Residential Policy 30.0(B) was a basis for our remand in ODOT I.

[9]Petitioner also argues under this assignment of error that the county's determination of compliance with the plan Roadways Goal is not supported by

The county argues petitioner failed to raise compliance with ZDO 1202.01B as an issue in ODOT I, and that ZDO 1202.01B was not a basis for our remand to the county. The county contends this issue has been waived and cannot be raised for the first time in this appeal. We agree. Beck v. City of Tillamook, supra; Adler v. City of Portland, supra.

The third assignment of error is denied.

The county's decision is remanded.

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substantial evidence in the whole record. However, we address compliance with the plan Roadways Goal under the second assignment of error.