1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 VERNE BATES,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 94-048
10 JOSEPHINE COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 VALLEY OF THE ROGUE BANK, an)
17 Oregon banking corporation,)
18)
19 Intervenor-Respondent.)
20
21
22 Appeal from Josephine County.
23
24 Verne Bates, Grants Pass, filed the petition for review
25 on his own behalf.
26
27 No appearance by respondent.
28
29 Walter L. Cauble, Grants Pass, filed the response brief
30 and argued on behalf of intervenor-respondent. With him on
31 the brief was Schultz, Salisbury, Cauble, Versteeg & Dole.
32
33 SHERTON, Referee; HOLSTUN, Referee, participated in the
34 decision.
35
36 AFFIRMED 09/02/94
37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a board of county commissioners
4 decision approving an exception to Statewide Planning
5 Goals 3 (Agricultural Lands) and 4 (Forest Lands), a
6 comprehensive plan map change from Forest to Residential,
7 and a zone change from Woodlot Resource - 20 Acre Minimum
8 (WR) to Rural Residential - 5 Acre Minimum (RR-5), for a
9 10.17 acre parcel.

10 **MOTION TO INTERVENE**

11 Valley of the Rogue Bank, the property owner and the
12 applicant below, moves to intervene in this proceeding on
13 the side of respondent. There is no opposition to the
14 motion, and it is allowed.

15 **FACTS**

16 The subject parcel is located in a rural area near the
17 unincorporated community of Hugo. The subject parcel was
18 originally part of a larger tract owned by petitioner. An
19 approximately 11,000 square foot residential care facility
20 structure, accessory buildings and a gravel parking lot are
21 located on the southern portion of the subject parcel.
22 Construction of the residential care facility structure on
23 the relatively steeply sloping property required cutting
24 into the bank to the north, and using the material removed
25 as fill to create a level building site on the southern
26 portion of the parcel.

Petitioner initiated construction of the residential care facility before the property was zoned. The property was initially zoned Forest Resource in 1973, and was changed to WR in 1981. Petitioner operated a licensed residential care facility on the subject property as a nonconforming use for a number of years. At some point, petitioner defaulted on a loan from intervenor, and intervenor foreclosed and became the owner of the 10.17 acre subject parcel containing the residential care facility structure. After the foreclosure, use of the subject parcel for a residential care facility was discontinued for over a year and its nonconforming use status was lost.

The wells, water storage facilities and septic drainfields serving the subject parcel are all located on adjacent property to the south that is still owned by petitioner. A court has awarded intervenor a non-exclusive easement for use of water from the wells and an exclusive easement for use, maintenance and repair of the existing septic system. Access to the subject property is via an easement across petitioner's property, from the end of Hitching Post Road, approximately 600 feet to the south of the subject parcel.

All land abutting the subject parcel is zoned WR. Record 74, 81. However, to the northeast and east is a large area zoned Forest Commercial (FC). To the southeast there is an area zoned Exclusive Farm (EF). To the south,

on the other side of petitioner's property, is an RR-5 zoned area located on either side of Hitching Post Road.

After a public hearing, the planning commission voted to recommend approval of the exception to Goals 3 and 4 and the plan map amendment from Forest to Residential. Record 289. The planning commission deadlocked, however, on whether to recommend approval of the zone change from WR to RR-5. Id. After an additional evidentiary hearing, the board of commissioners approved the goal exception, plan map amendment and zone change.

THIRD ASSIGNMENT OF ERROR

A. Planning Director Memo

Petitioner contends the challenged decision improperly relies on a memo from the planning director to intervenor concerning whether a residential care facility would be permitted in the RR-5 zone under the proposed Josephine County Land Development Code (Code).[1] Record 101-03. Petitioner argues this memo was specifically rejected and excluded from the record at the first planning commission hearing. Record 279. According to petitioner, this memo was not resubmitted to the board of commissioners during its subsequent proceedings.

[1]At the time the challenged decision was made, the Josephine County Zoning Ordinance (JCZO) was in effect and applicable to the subject application. However, the county was considering adoption of a new Land Development Code at the time of the proceedings below, and adopted the Code after the challenged decision was made.

Petitioner's only basis for contending the board of commissioners erred in relying on the disputed planning director memo is that the memo was specifically rejected by the planning commission and not resubmitted to the board of commissioners.[2] This amounts to a contention that the memo is not properly part of the record. The disputed planning director memo was submitted to this Board as part of the original local record. The planning commission minutes reflecting its rejection of the memo were submitted as a supplemental record. Although petitioner filed objections to the original record, petitioner failed to object, after submittal of either the original or supplemental record, to the inclusion of the disputed memo in the record. Petitioner cannot allege for the first time in his petition for review that a document included in the record was not actually placed before the local decision maker.

This subassignment of error is denied.

B. Exceptions Document

The challenged decision relies on a document in the record entitled "Exceptions Document for Lands Physically Developed for Other Uses" (hereafter Exceptions Document), dated April 19, 1993, prepared for intervenor.

---

[2]Petitioner does state the planning commission chairman "properly concluded that the memo addressed irrelevant and inapplicable subject matter." Petition for Review 16. To the extent petitioner disputes the evidentiary value of the memo, we will address that issue under the other assignments of error, if petitioner challenges an aspect of the decision for which the county relies on the memo for support.

1 Record 144-215. Petitioner contends this evidence
2 supporting intervenor's application was not submitted to the
3 planning department and available for review at least 20
4 days before the planning commission's October 4, 1993
5 hearing, as required by ORS 197.763(4)(a).[3] Petitioner also
6 contends that although the Exceptions Document was made part
7 of the staff report for the planning commission (Record 94),
8 it was not available at least seven days prior to the
9 planning commission's October 4, 1993 hearing, as required
10 by ORS 197.763(4)(b).[4]
11 Petitioner argues that on September 30, 1993, he
12 requested a copy of all documents pertaining to the subject
13 application, but was not provided with a copy of the
14 Exceptions Document. Petitioner contends that shortly
15 before the October 4 and 18, 1993 hearings before the
16 planning commission, the chairman of the Hugo Citizens
17 Advisory Committee (Hugo CAC) "was not furnished with the
18 [Exceptions Document] after making an effort to obtain a

---

[3]ORS 197.763(4)(a) provides:

> "All documents or evidence relied on by the applicant shall be submitted to the local government and made available to the public at the time notice [required by ORS 197.763(3)] is provided."

Pursuant to ORS 197.763(3)(f)(A), the county gave notice of the planning commission's October 4, 1993 hearing on September 14, 1993. Record 219.

[4]ORS 197.763(4)(b) provides, in relevant part:

> "Any staff report used at the hearing shall be available at least seven days prior to the hearing. * * *"

copy." Record 287. Petitioner argues the county has a "long-standing policy" that CAC chairpersons be provided copies of all documents submitted and relied on by applicants free of charge. Petition for Review 17. Petitioner further argues the minutes of the October 4, 1993 hearing indicate the Exceptions Document was not attached to the staff report, had not been seen by the planning commission, and was "just received" by the planning commission at or immediately prior to the October 4, 1993 hearing. Record 280-81.

The record does not establish that the Exceptions Document was submitted to the county and available for review 20 days prior to the October 4, 1993 planning commission hearing, as required by ORS 197.763(4)(a). However, ORS 197.763(4)(b) establishes a remedy for failure to comply with ORS 197.763(3)(a). Under ORS 197.763(4)(b), if evidence in support of the application is submitted at a later date, any party is entitled to a continuance of the hearing. In this case, the planning commission continued the hearing to October 18, 1993, and the record indicates a copy of the Exceptions Document was available for public review in the county planning office prior to the October 18, 1993 continued hearing. Record 285.

Petitioner's only complaint with regard to the availability of the Exceptions Document during the period between the October 4 and 18, 1993 hearings is that the

chairman of the Hugo CAC was not furnished with a copy of the document. The record does not show the chairman was denied an opportunity to review the Exceptions Document in the planning office, just that the chairman objected that "the only way the CAC could obtain [a copy of] the document was by paying 25 cents per page to the Planning Office." Record 287. However, petitioner identifies no county regulation or other legal requirement that the Hugo CAC chairman be given a copy of the Exceptions Document free of charge.

This subassignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Josephine County Comprehensive Plan (plan) Goal 11, Policy 5 (hereafter Policy 5) provides in relevant part:

> "In order to demonstrate that land is non-resource in capability and therefore appropriate for a non-resource Comprehensive Plan designation, the following information shall be provided:
>
> "A. The land does not fall within [Statewide Planning] Goal 3 requirements as shown by [three listed criteria.]
>
> "* * * * *
>
> "B. The land does not fall within [Statewide Planning] Goal 4 requirements as shown by:
>
> "1. The soils have a composite Internal Rate of Return [(CIRR)] of less than 3.50.
>
> "* * * * *
>
> "3. There are no extreme physical conditions

that require maintenance of vegetative cover.

"* * * * *

"5. [The] land is not part of a larger forest use."

The challenged decision includes findings that the subject parcel satisfies the criteria of Policy 5(A) and (B). Petitioner does not challenge the county's determination with regard to Policy 5(A). Petitioner does challenge the adequacy of or evidentiary support for the findings determining compliance with Policy 5(B)(1), (3) and (5).[5]

A. Policy 5(B)(1) -- CIRR

In Doob v. Josephine County, ___ Or LUBA ___ (LUBA No. 94-018, May 25, 1994), slip op 3-4, we described the role of CIRR in the county's planning process:

> "The acknowledged [plan] incorporates a document entitled 'Using Internal Rate of Return to Rate Forest Soils for Application in Land Use Planning.' This document, generally referred to as the Cumulative Internal Rate of Return (CIRR), sets out the plan's acknowledged methodology for rating forest soils. The CIRR contains a list of Josephine County soil types and gives each soil class a numerical value. The plan states that soils having a CIRR of 3.5 or greater are considered forest land, while soils with a CIRR below 3.5 are considered 'non-resource' soils. * * *"

---

[5]Petitioner does not, however, contend that compliance with plan Policy 5 is an inadequate basis for determining that the subject parcel is not farm or forest land subject to Statewide Planning Goals 3 and 4.

Petitioner contends that according to the acknowledged plan and published U.S. Soil Conservation Service (SCS) survey, the CIRR of the subject parcel should be 3.54. Record 98. Petitioner argues the county cannot determine the CIRR of the subject parcel is 2.99, as it did in the challenged decision, unless it obtains concurrence in that determination from the SCS. Petitioner also complains that a CIRR of 2.99 for the subject parcel is based on an incorrect determination by intervenor's consultant that soil was removed from 3.66 acres of the subject parcel that were excavated to provide a building site for the existing residential care facility. According to petitioner, evidence in the record from the SCS establishes that only 2.1 acres of the subject parcel were excavated.

We noted in Doob, supra, slip op at 5, that the plan allows case-by-case refinement of the mapping of soil types on particular properties, using soil types already recognized in the acknowledged CIRR document. Petitioner does not dispute that case-by-case refinements are permissible under the plan, but rather contends such refinements require SCS concurrence. Petitioner does not, however, point to any source for such a concurrence requirement, and we are aware of none.

The challenged decision finds the CIRR of the subject parcel is 2.99, based on the calculations of intervenor's consultant, using an excavated area of 3.66 acres.

1 Record 47. The challenged decision also finds, however,
2 that even if the excavated area of the parcel is actually
3 2.1 acres, as suggested by the SCS, the CIRR of the subject
4 parcel would be 3.23, also below the threshold of 3.5
5 established by plan Policy 5(B)(1). Record 48. These
6 findings are supported by substantial evidence in the
7 record. Record 64-66, 156-57, 266.

8 This subassignment of error is denied.

9 **B. Policy 5(B)(3) -- Extreme Physical Conditions**

10 The challenged decision recognizes that portions of the
11 subject property are steep, but determines there are no
12 extreme physical conditions that require maintenance of
13 vegetative cover. Record 49.

14 Petitioner contends this determination is not supported
15 by substantial evidence in the record. Petitioner points to
16 evidence that the slopes above the existing residential care
17 facility structure are 35 to 55 percent. Record 98, 156.
18 Petitioner also argues the Hugo CAC chairman testified there
19 has been a problem with slides on the subject parcel in the
20 past. Record 265.

21 Intervenor contends the challenged determination is
22 supported by the testimony of its consultant, a forestry
23 expert. Record 263-64. Intervenor argues the county is
24 entitled to rely on this expert testimony.

25 Substantial evidence is evidence a reasonable person
26 would rely on in reaching a decision. <u>City of Portland v.</u>

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). 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 assumptions underlying the expert's evidence, or that evidence supporting those assumptions be included in the record. Citizens for Resp. Growth v. City of Seaside, 26 Or LUBA 458, 465 (1994); 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. We have reviewed the evidence in the record cited by the parties with regard to compliance with Policy 5(B)(3), and believe it meets this standard.

This subassignment of error is denied.

C. Policy 5(B)(5) -- Part of a Larger Forest Use

The challenged decision states:

> "* * * The physical development of the property precludes it being part of a larger forest use. Timber has been cut in this area in the past. However, there are no managed forest lands around the subject property. For these reasons, the

> subject property is not part of a larger forest use. This is supported by the Exceptions Document and [intervenor's consultant's] testimony.
>
> "Opponents have testified that 'the site is committed to resource use since it is completely surrounded by resource land'; 'that timber production on these types of soils is as well [sic] as the national average' and that a nearby parcel 'has a lot of timber.' These statements are vague and none of them were made by witnesses who are qualified in comparison to [intervenor's consultant]. [N]one of these statements establish that the subject property is part of a larger forest use. * * *" (Emphasis added.) Record 49-50.

Petitioner contends the county's determination that the subject parcel is not part of a larger forest use is not supported by substantial evidence in the record. Petitioner argues the record shows the parcel is surrounded by other land designated Forest and zoned WR. Record 81. Petitioner also argues he testified that he logged the subject parcel twice in the last 20 years. Petition for Review App. 26. Petitioner further argues a letter from the U.S. Bureau of Land Management (BLM) establishes that actively managed O&C lands are located one-quarter mile from the subject parcel. Record 218.

Intervenor cites testimony by its expert forestry consultant that "there has been little or no forest management in the area in the past." Record 267. Intervenor also argues the choice between conflicting, believable evidence belongs to the county. <u>Angel v. City of Portland</u>, 22 Or LUBA 649, 659, <u>aff'd</u> 113 Or App 169 (1992).

We agree with the county the facts that the subject parcel is surrounded by other lands designated for resource use, and that the subject property has itself been logged in the past do not establish that the subject parcel is "part of a larger forest use." The relevant evidence to which we are cited is (1) testimony in the Exceptions Document and by intervenor's consultant that there has been little or no forest management activity in the area, and (2) the statement by the BLM that actively managed O&C land is located one-quarter mile from the subject property. Based on this evidence, a reasonable person could determine that the subject property is not part of a larger forest use.

This subassignment of error is denied.

The fourth assignment of error is denied.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In these assignments of error, petitioner challenges the exception to Goals 3 and 4 adopted by the challenged decision. However, in rejecting petitioner's fourth assignment of error, supra, we sustain the county's determination that the subject parcel is not farm or forest land subject to Goals 3 and 4. Therefore, an exception to Goals 3 and 4 is not required to support the plan map amendment to Residential and zone change to RR-5 adopted by the challenged decision, and we do not consider these assignments of error. DLCD v. Josephine County, 18 Or LUBA 798, 802 (1990).

1 The county's decision is affirmed.