BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEAN PEKAREK, Petitioner, vs. WALLOWA COUNTY, Respondent, and DAVID MANUEL AND LEE MANUEL, Intervenors-Respondent.	LUBA No. 96-135 FINAL OPINION AND ORDER

Appeal from Wallowa County.

Jean Pekarek, Enterprise, filed the petition for review and argued on her own behalf.

No appearance by respondent.

D. Rahn Hostetter, Enterprise, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Mautz, Baum, Hostetter & O'Hanlon.

HANNA, Chief Referee, participated in the decision.

REMANDED 05/23/97

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Hanna.

NATURE OF THE DECISION

Petitioner appeals the county's decision approving an application for a "zone permit" to allow a single family dwelling.[1]

MOTION TO INTERVENE

David and Lee Manuel move to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

On March 5, 1996, intervenors filed a zone permit application requesting approval for a single family dwelling on a 9.1 acre parcel. The subject property is located on the terminal portion of the Wallowa Lake Moraines in an area zoned Recreation Residential (R-2). The Wallowa County Zoning Articles (WCZA) allow single family dwellings in the R-2 zone "subject to administrative review for compliance with the general provisions" of the R-2 zone. WCZA 18.015. As permitted by the WCZA, the Planning Director referred the application to the Wallowa County Planning Commission for review. The planning commission concluded that "[a]ll applicable review criteria [have] been satisfied," and approved the application. Record 35. Petitioner appealed

[1]Under the Wallowa County Code, a "zone permit" is a land use approval for an allowed use in a given zone. Wallowa County Zoning Article 12.

that decision to the Wallowa County Court. The county court reviewed the application based on the record developed before the planning commission. It held two public hearings, during which it accepted statements from interested persons based on the planning commission record. The county court modified the decision of the planning commission by adding a new condition, and approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

WCZA 18.025(9) requires that "[e]vidence shall be submitted that * * * an adequate water supply [is] available or will be provided in conjunction with the proposed development." The county found that "adequate water has been established in the existing water and holding tanks." Record 4. Petitioner argues that this finding is not supported by substantial evidence in the record. Intevernors argue that the finding is adequately supported.

Substantial evidence is evidence a reasonable person would rely on to support a conclusion. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 690 P2d 475 (1984); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's

conclusion is supported by substantial 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); Eckis v. Linn County, 110 Or App 309, 821 P2d 1127 (1991). If there is substantial evidence in the whole record to support the county's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. Adler v. City of Portland, 25 Or LUBA 546, 554 (1993). However, in deciding whether a challenged decision is supported by substantial evidence in the whole record, we must consider whether supporting evidence is refuted or undermined by other evidence in the record. Eckis v. Linn County; Wilson Park Neigh. Assoc. v. City of Portland, 27 Or LUBA 106 (1994), aff'd 129 Or App 33, 877 P2d 1205, rev den 320 Or 453 (1994).

The record shows, and the parties do not dispute, that the proposed dwelling will be served by an existing well, which already serves a dwelling on the adjacent property. The record includes the results of a 24 hour flow test showing that the well produces 1 and 7/8 gallons per minute (gpm). Record 63 and 110. The water from the well is pumped into two 1100-gallon holding tanks, each of which is equipped with a separate pump, which can deliver pressurized

water to each dwelling.[2] The record contains a letter from an engineer evaluating the adequacy of this water system for both dwellings. Record 62 and 112. The engineer understood that the well produced 3 gpm, and stated that

> "[a] typical residential water use for in house is about 100 gallons per day per person. A five person house would therefore use 500 gallons per day, or allowing for periodic higher [usage], such as holidays with several visitors, a conservative water use of 1000 gallons per day per residence can be assumed. Note that this does not consider outside water uses for irrigation and landscaping. The two residences on the well would use up to 2000 gallons per day.
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> "The 3 gpm flow rate will produce 4320 gallons per day if run continuously. This provides a reasonable reserve factor provided that the well will produce 3 gpm continuously and the water is not used outside the house.
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> "I would recommend that the well be run continuously for a 24 hour period at the 3 gpm rate to make sure this rate is sustainable. Also the homeowners should be strongly advised that the well capacity is only adequate for in house uses, and that there is no guarantee that the well flow will hold up long term." Record 62 and 112.

Both parties rely on the results of the flow test and different parts of the engineer's letter to support their arguments.

The evidence to which we are cited does not constitute

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[2]The record includes a copy of an "Agreement for Joint Use," in which the intervenors and the neighboring property owners agreed to share equally the costs of developing, operating and maintaining a water system that was to include a 550-foot-deep well producing 4 gpm, and a single, 1500-gallon holding tank to serve both dwellings. The water system actually developed does not conform to the terms of the agreement.

substantial evidence to support the challenged finding that the water supply is adequate under WCZA 18.025(9). Intervenors point to the engineer's estimate that two dwellings "would use up to 2000 gallons per day," and the results of the 24-hour flow test showing that the well can produce 1 and 7/8 gpm, or almost 2700 gallons per day, as substantial evidence to support the county's finding that "an adequate water supply has been established." This reliance on isolated statements from the engineer's letter disregards, without explanation, the conclusion in that same letter that a well producing 3 gpm is barely adequate to meet the in-house water needs for two homes. In addition to the letter from the engineer, the record contains statements from two individuals questioning the adequacy of the water supply. One person stated that his own well produces 8 gpm, but that the well still cannot keep up with in-house demands if he "run[s] just one sprinkler outside." Record 39. The other person stated that she has a background in geology and geohydrology, and that she believes that the well at issue taps into a "very small perched aquifer." She questioned whether such a water source would be adequate for two dwellings. Record 40. The engineer's letter, taken as a whole, and the statements of the two individuals undermine the selected statements from the engineer's letter relied on by intervenors and the county to such a degree that the challenged finding is not

supported by substantial evidence in the record.

The first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In her second and third assignments of error, petitioner challenges the adequacy of the county's findings that the proposed dwelling meets the WCZA requirements that dwellings in the R-2 zone be no more than 25 feet tall, and have a roof pitch of 4/12.[3] WCZA 18.025(1) and (3).[4] Petitioner argues that the county's findings that the proposed dwelling meets these requirements are not supported by substantial evidence in the record, and that the county erred in not requiring the applicants to submit a scaled drawing of the proposed dwelling showing the height and roof pitch, as required by WCZA 6.030(2).

To obtain remand of a decision because information required by the local code is missing from the application, petitioner must explain why the missing information is necessary to determine that the proposed development complies with applicable approval standards, and that the

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[3]The roof pitch ratio shows rise over run, or the vertical height gain over the horizontal distance that is the width of the roof to its peak. WCZA 18.025(3) requires that the roof rise no more than 4 feet for every 12 feet it runs.

[4]WCZA 18.025(1) states that "[b]uilding heights in excess of twenty five feet must be in harmony with surrounding properties." Because the county found that the proposed dwelling would be 24 feet tall, it did not determine whether the structure would "be in harmony with the surrounding properties."

missing information is not otherwise in the record. Champion v. City of Portland, 28 Or LUBA 618 (1995). Petitioner argues that a scaled drawing is necessary to determine or establish the height and roof pitch of the proposed structure, and that absent such a scaled drawing, there is no evidence in the record showing how tall the proposed dwelling will be, or what its roof pitch will be. Consequently, according to petitioner, the county's findings regarding these two criteria are not supported by substantial evidence in the record.

Intervenors respond by pointing to drawings of the exterior of the proposed dwelling in the record, which include the following typewritten notations: "Roof pitch 4/12, Structure Height 24'." Record 118. Intervenors also rely on their own statements in the record, assuring the county that the dwelling will not exceed 24 feet in height, as well as their application, which states that "[a]ll structures will be 25 feet in height from the ground to the top of the roof." Record 90.

We have said that an unsupported statement in an application or other document is not evidence. Palmer v. Lane County, 29 Or LUBA 436 (1995); Calhoun v. Jefferson County, 23 Or LUBA 436 (1992). We have also said that assurances by the applicant or the applicant's attorney that the proposed use will not violate an applicable standard are not substantial evidence that the standard will be met.

Wuester v. Clackamas County, 25 Or LUBA 425 (1993); Neste Resin Corp. v. City of Eugene, 23 Or LUBA 55 (1992). The written and oral statements relied on by intervenors in this case are not supported by any documentation in the record, and therefore they do not constitute substantial evidence to support the county's findings that the proposed dwelling will be 24 feet tall and have a 4/12 roof pitch. The typewritten notations on the drawings of the exterior of the proposed dwelling also are nothing more than unsupported assurances that the dwelling will comply with the height and roof pitch requirements.[5] We agree with petitioner that the findings of compliance with these requirements are not supported by substantial evidence in the record. We also agree that the county erred in not requiring a scaled drawing of the proposed dwelling as required by the WCZA, because such a drawing is necessary to determine that the proposed dwelling complies with the applicable height and roof pitch standards, and the missing information is not otherwise in the record. Champion v. City of Portland.

The second and third assignments of error are sustained.

[5]The county expressly found that the drawings of the exterior to which we refer are not to scale and should not be relied upon to show compliance with the design standards. Record 4. In addition, we observe that the drawings of the exterior of the proposed dwelling show two different exterior designs. We cannot tell from this record which design is actually proposed.

FOURTH ASSIGNMENT OF ERROR

In her fourth assignment of error, petitioner takes issue with the county's condition of approval, which requires the planning director to deny the building permit for the proposed dwelling if the planning director "deems that substantial changes to the permit application have occurred." Record 5. Petitioner argues that the condition effectively defers findings of compliance with the design review standards until the building permit stage, which does not require notice or a hearing. Petitioner asserts that such a deferral is improper and prejudices her substantial rights, because it denies her the right to participate in the process in which the county will determine whether the proposed dwelling complies with the applicable design standards. The relevant findings and condition state:

> "Finding 7.5 After considerable deliberation, the [County] Court finds that the 25' structure height will be met. In that, the sketch submitted was not intended to serve as actual drawings of the proposed structure, is not to scale and therefore should not be relied upon for strict compliance with a standard. Upon application for a building permit, the drawings of the structure must be in harmony with the appearance of the sketch presented with the application and must meet the standards as presented in the application. Therefore, the [County Court] chooses to modify the decision of the Planning Commission by adding a condition of approval addressing procedure upon submission of a building permit application (see finding 7.6).
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> "Finding 7.6 The [County] Court finds that the Planning Commission decision was prudent and that the decision of the Commission should be adopted

> by reference herein. However, the [County] Court further finds that modification of the decision for clarification of the intent is necessary. Therefore, an additional condition of approval shall be placed providing that if substantial changes occur at the time of application for a building permit, the building permit shall be denied and the zone permit shall be deemed no longer valid.
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> "Condition 8.1 Upon application for a building permit under the auspices of this zone permit, if the [Planning] Director deems that substantial changes to the permit application have occurred, the building permit shall be denied and the zone permit shall be deemed invalid." Record 4-5.

Our cases establish that a local government may not defer determinations of compliance with applicable approval standards. Foland v. Jackson County, 18 Or LUBA 731, 773 (1990). Our cases also provide that a local government cannot defer determinations of compliance with a mandatory approval criterion to a later stage in its approval process unless its regulations or decision require the full opportunity for public involvement provided in the proceeding from which the required determination was deferred. Holland v. Lane County, 16 Or LUBA 583, 596 (1988) The absolute prohibition against deferred determinations of compliance found in Foland applies where the local government has only one opportunity to make a land use decision regarding the proposed development, and must find the proposed development meets the applicable criteria as part of the challenged decision. The more flexible

standard found in Holland applies where the proposed development is subject to multiple land use approvals, or multiple phases of approval, and the applicable criteria must be met before the final land use approval can be granted, but findings of compliance with the criteria are not necessarily required as an element of any one particular approval in the sequence of approvals.

This case is closer to Foland than it is to Holland, because no additional land use approvals are required before the proposed dwelling can be built. Because we conclude that the county's finding that the proposed dwelling will be 24' tall is not supported by substantial evidence, we agree that the condition quoted above improperly defers findings of compliance with applicable design standards to the building permit stage.[6]

The fourth assignment of error is sustained.

The decision is remanded.

[6]Even if Holland applied in this case, the county has not established that it will ensure an adequate notice and opportunity to be heard prior to a determination of whether the criteria are satisfied.