BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CLACKAMAS COUNTY SERVICE DISTRICT NO. 1,	)	
Petitioner,	)	
vs.	)	
	)	LUBA No. 98-047
CLACKAMAS COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
and	)	
JERRY NORDSTROM and BARBARA KEMPER,	)	
Intervenors-Respondent.	)	

Appeal from Clackamas County.

Clark I. Balfour, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Cable Huston Benedict and Haagensen.

Pamela J. Beery, Portland, filed an amicus brief and argued on behalf of The League of Oregon Cities. With her on the brief was Beery and Elsner.

Susie L. Huva, Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

Jerry Nordstrom, Clackamas, filed a response brief and argued on his own behalf.

Barbara Kemper, Clackamas, filed a response brief and argued on her own behalf.

HOLSTUN, Board Member; GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

AFFIRMED 12/17/98

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner Clackamas County Service District No. 1 appeals a county hearings officer decision denying its request for approval to construct a stormwater treatment and collection facility.

MOTION TO INTERVENE

Barbara Kemper and Jerry Nordstrom move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

MOTION TO STRIKE

Petitioner moves to strike Appendices 1 through 4 attached to intervenor-respondent Kemper's brief. The appendices are offered for their evidentiary value, and petitioner contends they are not included in the record submitted by respondent in this matter.

Intervenor-respondent Kemper concedes that Appendices 1 through 4 are not included in the record in this matter. We therefore grant petitioner's motion to strike the appendices.

Petitioner also moves to strike seven separate passages in intervenor-respondent Kemper's statement of facts. That a brief includes allegations of fact that are not supported by the record is not grounds for striking those allegations from the brief. Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 78, aff'd 89 Or App 40, 747 P2d 373 (1987). However, where allegations of fact in a brief are not supported by the record, we disregard those allegations of fact. Mannenbach v. City of Dallas, 25 Or LUBA 136, 138, aff'd 121 Or App 441, 856 P2d 345 (1993); Hammack & Associates, 16 Or LUBA 78. Intervenor-respondent Kemper concedes that some of the challenged allegations rely on evidence outside the record, but she contends that other allegations are supported by evidence in the record.

Petitioner's motion to strike the cited allegations in intervenor-respondent Kemper's brief is denied. However, we disregard the challenged allegations of fact in intervenor-respondent Kemper's brief, to the extent they are not supported by the record in this matter.

FACTS

An adequate summary of facts is set forth in the county's brief:

> "Clackamas County Service District No. 1 ('Petitioner') is a county service district governed by the Board of County Commissioners * * *. [Petitioner's duties include providing] surface water management and collection treatment services, partly geared toward reducing pollution in water resources. Presently, Petitioner serves approximately 10,550 acres. Of those, 2,870 acres compose the Cow Creek and Sieben Creek basins, which drain to the Clackamas River. The project at issue in this case, ('130th Project'), is intended to treat surface water on approximately 321 of those 2,870 acres.
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> "* * * The 130th Project is identified as a priority project in the Drainage Master Plan created for Petitioner in 1995 by KCM, Inc., and adopted by the Board in 1996. * * *
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> "Petitioner considered many sites as possible locations for the storm water trunk line and storm water treatment facility involved in the 130th Project. Petitioner concluded that all but three of the sites considered failed to meet the project objectives outlined in the Master Plan. One of the three sites which Petitioner believed could satisfy the Master Plan objectives is the EFU site identified in Petitioner's application in this case as: 'Stanfill / Zimmerman.' Another site which Petitioner believed could satisfy the Master Plan objectives is an Industrially Zoned site not contemplated by Petitioner's application in this case: 'Clackamas Sand & Gravel.' The third site, which was not addressed in depth at the hearing on this application, and which does not appear to have the advantages of the two sites already named, is referred to as 'RD 10.'
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> "Petitioner justified its preference for the EFU site through application of the following criteria, developed by Petitioner based on the objectives in the Master Plan:
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> "(a) Proximity to the River * * *
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> "(b) Outfall Consideration * * *
>
> "(c) Size * * *
>
> "(d) Willing Seller/Willing Buyer * * *

"(e) Protection of Water Intakes * * *

"(f) Cost * * *

"(g) Three Basin Rule/Water Quality Issues * * *

"(h) Avoiding Existing Utilities * * *

"(i) Traffic/Pedestrians * * *

"(j) Other Impacts * * *

"(k) Financing * * *.

"Petitioner selected the EFU site as the preferred location based on its application of [the above] criteria for the 130th Project, and submitted an application to Clackamas County for construction of a storm water trunk line and storm water treatment facility there. The Hearings Officer denied this application, holding that OAR 660-033-0120 and OAR 660-033-0130(16) prohibit locating such a facility in an agricultural zone when other viable non-agricultural locations are also available to meet the facility's purpose. This appeal ensued." Respondent's Brief 2-5. (Record citations omitted).

INTRODUCTION

Because county code provisions adopted to implement statutory EFU zoning requirements must be consistent with the statutory requirements, we begin with the relevant statutory language. See Kenagy v. Benton County, 112 Or App 17, 20, n 2, 826 P2d 1047 (1992)(county may not apply ordinance criteria that are inconsistent with the statutory EFU zone criteria). Under ORS 215.213(1)(d) and 215.283(1)(d) counties may allow the following facilities in its EFU zone:[1]

"Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over 200 feet in height."

Under Brentmar v. Jackson County, 321 Or 481, 496, 900 P2d 1030 (1995), counties must allow uses specified under ORS 215.213(1) and 215.283(1) (including "utility facilities

[1]The statutory language in ORS 215.213(1)(d) and 215.283(1)(d) is identical. ORS 215.213(1) applies to counties that have adopted marginal lands provisions; ORS 215.283(1) applies to counties that have not adopted marginal lands provisions. ORS 215.283(1)(d) applies to respondent.

necessary for public service") on EFU-zoned lands, and may not impose additional approval criteria beyond those contained in the statute. Since the "utility facility" at issue in this appeal would not generate power and does not include a transmission tower, the only question for the hearings officer was whether the proposed facility is "necessary for public service."

The required legal analysis to determine whether a "utility facility" is "necessary for public service" is governed by OAR 660-033-0120 and 660-033-0130(16).[2] As the Oregon Supreme Court explained in Lane County v. LCDC, 325 Or 569, 583, 942 P2d 278 (1997), while a county may not impose regulatory criteria in addition to those criteria present in the statutory language in ORS 215.213(1) and 215.283(1), LCDC may do so . OAR 660-033-0120 and 660-033-0130(16) essentially codify the holding in McCaw Communications, Inc. v. Marion County, 96 Or App 552, 773 P2d 779 (1989), which reversed LUBA's decision in McCaw Communication, Inc. v. Marion County, 17 Or LUBA 206 (1988). We briefly discuss those cases before turning to the assignments of error.

LUBA's decision in McCaw specifically considered the question of whether an applicant for approval of a utility facility in an EFU zone must show that it is "necessary" to place the proposed facility on EFU-zoned land (as opposed to non-EFU-zoned land). LUBA relied on its earlier decision in Meland v. Deschutes County, 10 Or LUBA 52, 56 (1984), which set out three possible meanings of the requirement that such a facility be "necessary":

> "The first is that the facility must be found to provide a necessary public service. That meaning would require a finding that, without the service, there would be a substantial hardship or difficulty. The second meaning * * * is that the term requires a finding that it is necessary to locate the facility in the EFU zone to serve the residents there.
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> "Respondent county * * * asserts a third meaning. It contends the phrase means a facility that is necessary in order for an entity to provide a public service." 10 Or LUBA at 56. (Emphases in original.)

[2]The rule language is quoted below.

In McCaw, LUBA selected the third interpretation:

> "With regard to the 'necessity' issue, we agree with the attorney general and adhere to our prior opinion in Meland v. Deschutes County, 10 Or LUBA at 56, that a facility 'necessary for public service' means a facility that is necessary in order for the entity to provide a public service, not that it is necessary to locate the facility at the particular location proposed." 17 Or LUBA at 222.

On judicial review, the Court of Appeals reversed LUBA's interpretation:

> "In the abstract, LUBA's choice among the three interpretive options it described in Meland might have been as linguistically supportable as either of the others. Given the legislative purpose, however, we are unable to agree that the word 'necessary' has no relationship to the proposed location of the use on land zoned for agriculture. We conclude that, for a 'utility facility' to be permitted under [county code language corresponding to ORS 215.213(1)(d) and 215.283(1)(d)], the applicant must establish and the county must find that it is necessary to situate the facility in the agricultural zone in order for the service to be provided." McCaw, 96 Or App at 555-56. (Emphasis added; footnote omitted.)

As relevant in this appeal, OAR 660-033-0120 simply duplicates the statutory language in ORS 215.213(1)(d) and 215.283(1)(d).[3] OAR 660-033-0130(16) codifies the Court of Appeals holding in McCaw.[4] The hearings officer applied OAR 660-033-0120 and 660-033-0130(16) and denied the application. The hearings officer concluded that the subject property might be "the best site," but that sites that are not zoned EFU, including the Clackamas Sand and Gravel (CSG) site, "are technically suitable and available to accommodate" the proposed facility. Record 11.

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[3]OAR 660-033-0120 refers to a table, which lists the following use as allowed, subject to OAR 660-033-0130(16):

> "Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over 200 feet in height."

[4]OAR 660-033-0130(16) provides:

> "A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided."

AMICUS ARGUMENTS

Amicus argues that the inquiry required by OAR 660-033-0120 and 660-033-0130(16) is so subjective that "hearings officials in various jurisdictions are arriving at varying and, in some cases, inconsistent determinations about how to evaluate the term 'necessary' and how that determination applies in any particular case." Amicus Brief 2. According to amicus, this uncertainty means that significant resources may be expended to plan for public facilities only to have a hearings officer conclude that those facilities may not be located on EFU-zoned lands. Amicus also speculates that local governments may attempt to amend their land use regulations to define what is "necessary," resulting in a greater danger of lack of uniformity in applying the rule.

We have no reason to dispute amicus' concern about the current lack of clarity about how utility providers must go about addressing the statutory and rule language. However, we do not agree that LUBA is the appropriate body to clarify that language. Certainly the Court of Appeals could elect to revisit its interpretation in McCaw of the "necessary" component of ORS 215.213(1)(d). Within the parameters articulated in LCDC v. Lane County, LCDC also could amend OAR 660-033-0120 and 660-033-0130(16) to clarify or establish relevant factors to add the certainty that amicus believes is desirable. However, it would be particularly inappropriate for this Board to attempt to clarify or to establish factors for compliance with LCDC's administrative rule. LCDC is the appropriate body to provide any such clarification or elaboration of the meaning of OAR 660-033-0120 and 660-033-0130(16).

FIRST AND SECOND ASSIGNMENTS OF ERROR

If we understand petitioner correctly, it takes the position under the first two assignments of error that petitioner's selection of criteria (a) through (k) and its application of those criteria to determine that it is necessary for the disputed facility to be located on the

subject EFU-zoned parcel was binding on the hearings officer.[5] In its first assignment of error, petitioner argues the hearings officer lacked "jurisdiction" to apply those criteria independently or reach a different conclusion based on those criteria. In its second assignment of error, petitioner argues the hearings officer "misconstrued applicable law" by not deferring to the Board of Commissioner's conclusion that the subject property is needed.

Petitioner cites no authority for the arguments it makes under the first two assignments of error. Petitioner argues that the Board of Commissioners "is exclusively vested with the power to determine the level, configuration and timing and funding of services as part of its delegated function under ORS Chapter 451." Petition for Review 16. That argument may have merit, but it does not follow from that argument that the Board of Commissioners' determination that a particular site is "necessary" for the proposed facility is legally binding on the hearings officer. If the hearings officer were legally required to defer to the Board of Commissioners' site selection or lacked jurisdiction to independently consider whether the Board of Commissioners adequately demonstrated that the subject property is "necessary," within the meaning of OAR 660-033-0120 and 660-033-0130(16), his decision would be an empty formality.

Petitioner and amicus both suggest that the hearings officer's decision in this matter constitutes an improper collateral attack on petitioner's adopted Drainage Master Plan or petitioner's subsequent decision that the subject property is necessary, based on the criteria selected by petitioner. Petition for Review 16; Amicus Brief 23-24.

If the Drainage Master Plan had been adopted by the county as a comprehensive plan or land use regulation, the hearings officer's decision in this case would be required to

[5]Those criteria are quoted, in part, in our discussion of the facts above.

comply with that plan. ORS 197.175(2)(d).[6] However, neither petitioner nor amicus identify anything in the record that suggests the Drainage Master Plan was adopted as a new or amended comprehensive plan or land use regulation under ORS 197.610 to 197.625. Neither do we know whether the process that petitioner used to adopt the Drainage Master Plan satisfied the procedural requirements of OAR 660-033-0120(2).[7] Moreover, it does not appear that the Drainage Master Plan actually determined that the subject property is "necessary;" rather, it identifies the subject property as the preferred site and sets the stage for final selection of a site for the facility.[8] Because the Drainage Master Plan was not adopted as a comprehensive plan or land use regulation and does not determine that the subject property is "necessary" for the facility, within the meaning of OAR 660-033-0130(16), the hearings officer's decision that the property is not "necessary" is not inconsistent with, and could not constitute an impermissible collateral attack on, the Drainage Master Plan.

After the Drainage Master Plan was adopted, petitioner apparently used the criteria set out above in our discussion of the facts to determine that the subject property is necessary for the proposed facility. That determination clearly is not a comprehensive plan or land use regulation, with which the decision challenged in this appeal could be required to comply

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[6]ORS 197.175(2)(d) requires that county land use decisions comply with acknowledged comprehensive plans and land use regulations. Under ORS 197.835(8), we are required to reverse or remand a land use decision that does not comply with applicable provisions of a comprehensive plan or land use regulation.

[7]Under OAR 660-033-120(2) and table 1 of that rule, utility facilities in the EFU zone require review and "notice and opportunity for a hearing."

[8]The order adopting the Drainage Master Plan explains:

> "[A]s each project defined in the master plan is further analyzed and refined, project-specific decisions will be made by the Board as to final project scope of work, land acquisition, financing, and timing * * *." Record 294.

under ORS 197.175(2)(d).[9] If that separate determination had been made by the Board of Commissioners as a land use decision, pursuant to a process that satisfied the requirements of OAR 660-033-0120, such a decision might have some bearing on the hearings officer's decision concerning whether the subject property is "necessary" within the meaning of OAR 660-033-0130(16).[10] See North Clackamas School Dist. v. White, 305 Or 48, 52, 750 P2d 485, modified 305 Or 468, 752 P2d 1210 (1988) (judge-made res judicata rules should be applied in administrative proceedings "where they facilitate prompt, orderly and fair problem resolution"); but see Nelson v. Clackamas County, 19 Or LUBA 131, 137-40 (1990) (preclusive effect should not be given to issues previously decided by a local government decision maker in another proceeding). However, petitioner does not make that argument, and it does not appear that the criteria were applied by the Board of Commissioners in a land use decision.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues the hearings officer's decision is not supported by substantial evidence. LUBA's review of the evidence is limited to determining whether a reasonable person could reach the decision the hearings officer reached, considering all of the evidence in the record. 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). If the evidence in the whole record is such that a reasonable person could reach the decision the hearings officer reached, LUBA will defer to the decision, notwithstanding that reasonable

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[9]Petitioner's position concerning application of the criteria is explained in a memorandum from petitioner's engineering consultant. Record 258-67. We are not cited to any order or ordinance where the Board of Commissioners applied the criteria to find that the subject property is necessary for the proposed facility.

[10]We need not and do not decide that question. If the question were presented, it might also be important whether the Board of Commissioners in rendering such a decision was acting in its capacity as the governing body of petitioner or as governing body of the county.

people could also draw different conclusions from the evidence. Carsey v. Deschutes County, 21 Or LUBA 118, 123, aff'd 108 Or App 339, 815 P2d 233 (1991); Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).

Petitioner discusses some of the evidence it believes supports its view that it is necessary for the disputed facility to be sited on the subject EFU-zoned site. Petition for Review 18-21.[11] Petitioner also states that "[t]he information provided by the Intervenor-Respondents is unreliable." Petition for Review 17. However, petitioner makes no attempt to explain why it believes intervenor's information is unreliable, and some of intervenor Nordstrom's evidence calls into question the accuracy and significance of some of the evidence that petitioner argues the hearings officer should have relied upon.[12] Record 25-34.

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[11]Petitioner's evidentiary arguments under the third assignment of error include the following:

1. Use of the Gravel site will add an additional "$1,159,800 to the project cost, results in extra, on-going obligations for the District in maintaining, inspecting, replacing and repairing the pipe, and requires disruption of existing utilities and roadway improvements by following the road right-of-way to the Clackamas Sand & Gravel site." Petition for Review 18.

2. The Gravel site is located "45 feet above the river" and will require "an additional $136,900 in cost and re-configuring the site adds $426,300." Petition for Review 18-19.

3. The sale price of the EFU-zoned site is "$700,000" and the sale price of the gravel site will be "$2.3 million." Petition for Review 19.

4. The owner of the Gravel site is not a willing seller.

5. The CSG site is closer to downstream drinking water intakes than is the EFU-zoned site.

6. "The impact [of the hearings officer's decision] on the Capital Improvement Program is crushing, and the deferral of Project is not reasonable considering the large amount of capital improvement projects that need to be made and the limited budget resources." Petition for Review 21.

[12]For example, intervenor Nordstrom submitted evidence that the total land and development costs for the proposed facility at the CSG site would not be significantly higher than total land and development costs at the EFU-zoned site ($7,037,687 vs. $6,465,600). Record 27. When that total cost is expressed as cost per acre of the entire drainage area served by each site, intervenor Nordstrom explained that the total cost was actually less at the CSG site than at the EFU-zoned site ($16,404 per acre vs. $20,142 per acre). Id.

The hearings officer concluded that petitioner failed to carry its burden to demonstrate that it is necessary to site the proposed facility on the EFU-zoned site:

> "* * * This record includes a significant amount of conflicting technical data and opinion evidence. In support of its application, the applicant has submitted a series of maps, cost analyses and other substantial evidence which is sufficient to explain the applicant's preference for this site, as opposed to other potential sites on non-EFU [zoned] land. That evidence, viewed in a light favorable to the applicant, is also sufficient to establish that there is a cost advantage and some technical advantages which would be achieved by locating the proposed facility on the subject property, as opposed to other potential identified sites. That evidence, however, even if viewed in a light favorable to the applicant, is not sufficient to establish that other identified or discussed potential sites cannot be utilized to provide the required surface water and storm water detention and treatment.
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> "* * * * *
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> "In summary, although the subject property may be the best site for the proposed facility, the applicant has not established that it is necessary to site the facility on the subject property, or any other EFU [zoned] land, in order for the service to be provided. Indeed, this record establishes that the Clackamas Sand and Gravel and other potential sites are technically suitable and available to accommodate this use on non-EFU [zoned] land. Record 10-11.

There is language in the omitted part of the above-quoted section of the hearings officer's decision that suggests that the hearings officer believed that an applicant seeking to site a utility facility on EFU-zoned land must demonstrate that there are no "feasible alternatives" for constructing the utility facility on non-EFU-zoned lands. We agree with that characterization of what the applicant must demonstrate to comply with OAR 660-033-0120 and 660-033-0130(16). It may be that at some point the non-EFU-zoned alternative sites for a utility facility could be so technically difficult or costly to develop that those alternative sites are not appropriately viewed as "feasible alternatives." In such a circumstance, a cheaper, less technically challenging, EFU-zoned site might be the only feasible alternative site and therefore "necessary." However, the evidence in this appeal falls well short of demonstrating that such is the case here. At best, the record includes

conflicting evidence concerning the magnitude of the additional cost of developing the facility at the CSG site. We agree with the hearings officer that the applicant failed to demonstrate that the CSG site is not a feasible alternative to the EFU-zoned site that the applicant prefers.[13]

We conclude the hearings officer's decision is supported by substantial evidence, i.e. evidence a reasonable person could believe.

The third assignment of error is denied.

The county's decision is affirmed.

[13]The hearings officer decision adequately demonstrates that he considered the applicant's evidence and arguments concerning the cost and technical difficulties of developing the CSG site, as well as the possible implications such added costs and technical difficulty may have for other projects that the applicant wishes to implement with its limited funds.