

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 DALE R. LISSNER,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11 and

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13
14 TIMBERLINE BAPTIST CHURCH,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2006-059

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Washington County.

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24 Dale R. Lissner, Sherwood, filed the petition for review and argued on his own
25 behalf.

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27 No appearance by Washington County.

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29 Ross Day, Tigard, filed the response brief and argued on behalf of intervenor-
30 respondent. With him on the brief was Oregonians in Action Legal Center.

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32 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
33 participated in the decision.

34
35 AFFIRMED

02/13/2007

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals county approval of a church and day care facility.

FACTS

Intervenor-respondent Timberline Baptist Church (intervenor) applied for special use approval from Washington County to operate a church, school, and day care facility at the junction of Capitol Highway and Highway 99W. The county approved the church and day care facility, but denied the application for the school. In a separate appeal, we affirmed the county's denial of the proposed school. *Timberline Baptist Church v. Washington County*, ___ Or LUBA ___ (LUBA No. 2006-058, August 10, 2006), *appeal pending*. Petitioner opposed the application due to concerns about traffic impacts at the nearby intersection of Chapman Road and Highway 99W. The county hearings officer approved the church and day care facility over petitioner's objections. This appeal followed.

MOTION TO STRIKE

Intervenor moves to strike a number of documents in the appendices attached to the petition for review, because they are not part of the record. We agree with intervenor that the appendices include documents that are not part of the record. The motion to strike is granted. The Board will not consider the documents in Appendix D, pages 1, 4, 7-9 and 10-19, or the entirety of Appendices E and F, or any references to those documents in the petition for review itself.

REPLY BRIEF

Petitioner moves to file a reply brief that responds to a motion to strike a number of documents attached to the petition for review. A reply brief is a permissible vehicle to respond to a motion to strike in the response brief, and the reply brief is allowed. However, we note that attached to the reply brief are several documents that are also subject to the

1 motion to strike, which we have granted. We do not consider any documents attached to the
2 reply brief that are the subject of the motion to strike.

3 **ASSIGNMENT OF ERROR**

4 The petition for review includes no assignments of error denominated as such. The
5 nearest thing to a recognizable assignment of error is a single paragraph labeled
6 “ARGUMENT.” It is difficult to discern a cognizable assignment of error from that
7 paragraph or related statements elsewhere in the petition for review. Nonetheless, the failure
8 to set out an assignment of error is not fatal. *See Freedom v. City of Ashland*, 37 Or LUBA
9 123, 124-25 (1999) (when the petition for review does not set out assignments of error,
10 LUBA will consider alleged errors to the extent they can be discerned from the petition for
11 review).

12 It is reasonably clear that petitioner believes the intersection of Highway 99W and
13 Chapman Road (the intersection) to be more dangerous than the hearings officer understood
14 it to be. Although petitioner does not cite it, presumably there is some county approval
15 criterion requiring a showing that transportation facilities affected by the proposed
16 conditional use are safe or adequate. Petitioner appears to argue that the hearings officer
17 erred in relying on testimony from a representative of the Oregon Department of
18 Transportation (ODOT) regarding the accident rate at the intersection, and had the hearings
19 officer examined other evidence that is not in the record, the hearings officer might have
20 agreed with petitioner that the intersection is dangerous and imposed study requirements or
21 other conditions to make it safer. In essence, petitioner’s argument is a substantial evidence
22 challenge to the evidence the hearings officer relied on in evaluating the safety of the
23 intersection.

24 As a review body, we are authorized to reverse or remand the challenged decision if it
25 is “not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C).
26 Substantial evidence is evidence a reasonable person would rely on in reaching a decision.

1 *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v.*
2 *State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes*
3 *County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the
4 evidence, however, we may not substitute our judgment for that of the local decision maker.
5 Rather, we must consider and weigh all the evidence in the record to which we are directed,
6 and determine whether, based on that evidence, the local decision maker's conclusion is
7 supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d
8 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441
9 (1992).

10 Petitioner does not explain why the ODOT testimony is not substantial evidence
11 regarding the safety of the intersection, other than to assert that that testimony is contradicted
12 by another document that is not in the record.¹ Absent circumstances not present here, our
13 review is confined to the local record. ORS 197.835(2)(a). A substantial evidence challenge
14 may not be based on evidence that is not in the local record and was not before the final
15 decision maker.

16 To the extent petitioner's evidentiary challenge is limited to evidence we can
17 consider, petitioner has not demonstrated that the evidence the hearings officer relied upon is
18 not evidence that a reasonable person would rely on to find that additional study of the
19 impact on the intersection is unwarranted. Intervenor explains that its traffic consultant
20 submitted a traffic impact analysis demonstrating that the proposed development would not
21 reduce the level of service for the intersection below adequate safety levels, and ODOT also
22 submitted comments that the intersection would meet safety standards. Record 600, 548.
23 Although the hearings officer considered petitioner's testimony that the intersection would

¹ Petitioner attempted to include this document in the record through record objections and two motions to take evidence outside of the record, all of which the Board denied. Petitioner attached the document again to the petition for review, and that document is among the documents we do not consider pursuant to intervenor's motion to strike.

1 not meet safety standards, he found intervenor's expert and ODOT's testimony more
2 convincing. Record 17. We cannot say that a reasonable person would not reach the same
3 conclusion, based on the evidence in the whole record.

4 Finally, the petition for review includes a sentence complaining that the second half
5 of the public hearing was not recorded due to faulty equipment or human error, and that this
6 error "did not allow proper review of sworn statements by the Hearings Officer or [by] the
7 public." Petition For Review 3. However, petitioner does not explain why any failure to
8 completely record the public hearing provides a basis for reversal or remand. The hearings
9 officer presumably heard the original oral testimony, and petitioner does not explain why the
10 hearings officer or the public was prejudiced by their inability to review the audiotapes of
11 that hearing prior to issuance of the decision. In addition, reversal or remand of a decision
12 based on procedural error is only appropriate if the error prejudices *petitioner's* substantial
13 rights. ORS 197.835(9)(a)(B). Petitioner does not allege that the recording error prejudiced
14 his substantial rights.

15 The county's decision is affirmed.