

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FALCON RIDGE, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF KLAMATH FALLS,
10 *Respondent.*

11
12 LUBA No. 2008-128

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Klamath Falls.

18
19 Michael P. Rudd and Drew A. Humphrey, Klamath Falls, filed the petition for
20 review. With them on the brief was Brandsness, Brandsness & Rudd P.C. Michael P. Rudd
21 argued on behalf of petitioner.

22
23 Roger A. Alfred, Portland filed the response brief and argued on behalf of
24 respondent. With him on the brief were Perkins Coie LLP and Richard C. Whitlock, City
25 Attorney.

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27 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

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29 RYAN, Board Member, did not participate in the decision.

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31 AFFIRMED

11/04/2008

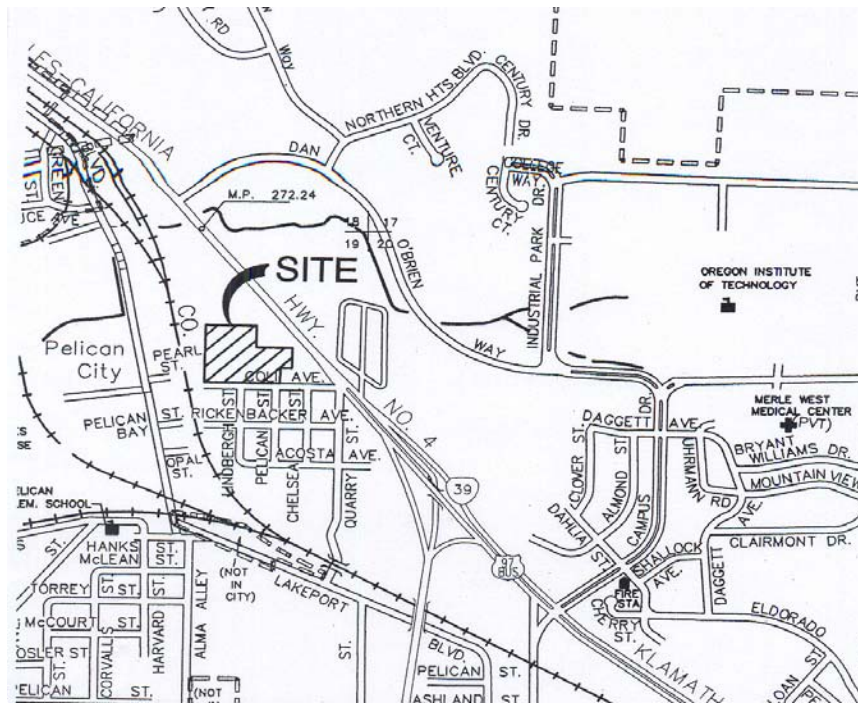
32
33 You are entitled to judicial review of this Order. Judicial review is governed by the
34 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city council decision that denies its request for subdivision approval.

FACTS

Petitioner sought county approval to subdivide an approximately eight-acre parcel into 25 lots. Petitioner proposes to develop those lots with a total of 91 residential units. The subject eight acres lie to the north of an existing residential area. The eight acres and the existing residential area are bounded by railroad tracks to the west and Highway 97, a major north/south arterial, to the east. The railroad tracks and Highway 97 make it difficult to provide access to the eight acres and existing residential area. Primary access to the existing residential area is presently provided by Coli Avenue, an east-west local roadway that intersects Highway 97 a short distance north of the existing Highway 97/Highway 39 intersection. A map from the record is included below.



1 Quarry Street provides a second access to the existing residential area from the south.
2 However, that access must pass under the railroad tracks via a tunnel that is too low and
3 narrow for fire equipment access. Existing safety problems at the Highway 97/Coli
4 intersection and the single access point for fire equipment became the focus of the local
5 proceedings.

6 The city planning commission considered the application at a hearing on November
7 13, 2007 and voted to approve the application. Record 225. That decision was supported by
8 a November 13, 2007 planning staff report. Record 237-50. Before the city council
9 considered the proposal, Klamath County Fire District No. 1 (Fire District) submitted a letter
10 in which it opposed the proposal. According to the Fire District, under the Oregon Fire
11 Code, a maximum of 30 residences may be located in areas served by a single access suitable
12 for fire equipment. The Fire District advised the city that the existing residential area already
13 exceeded this maximum and the proposed 90+ residential units would further exacerbate that
14 noncompliance. Record 200-201. In addition, the Fire District stated in its letter that
15 “[c]ontrary to statements of others, * * * Fire District * * * personnel have frequently
16 responded to motor vehicle accidents at the intersection of Hwy 97 & Coli Ave. and in the
17 general section of Hwy 97 between Dan O’Brien Way and the Hwy 97 Southbound exit
18 ramp.” *Id.* Based on the Fire District letter, planning staff prepared a revised staff report
19 which included findings that Oregon Fire Code standards are not met. Record 50-59.

20 In response to the Fire District letter, petitioner proposed a second access to Highway
21 97 via Byrd Avenue. Byrd Avenue is an unimproved east-west right of way that runs along
22 the north property line of the eight acres and intersects Highway 97 approximately half way
23 between the Highway 97/Dan O’Brien Way intersection to the north and the Highway
24 97/Highway 39 interchange to the south. The Oregon Department of Transportation (ODOT)
25 indicated it would likely issue an access permit for the Byrd Avenue access as a gated
26 secondary access for fire equipment use only. Record 111. However, ODOT also noted that

1 it planned to make improvements to the existing Highway 97/Dan O'Brien Way interchange
2 in the future. Apparently once that interchange is reconstructed all local connections to
3 Highway 97 in the vicinity would be through that interchange via frontage roads. Record
4 110-111. ODOT testified that after the Highway 97/Dan O'Brien Way interchange is
5 improved, Byrd Avenue would have access via a new frontage road to Dan O'Brien Way to
6 the north. But after the Highway 97/Dan O'Brien Way intersection improvements, Byrd
7 Avenue would no longer be permitted direct access onto Highway 97. Record 33.

8 The subdivision application was supported by a transportation impact analysis (TIA).
9 Record 349-60. That study examined a number of factors including: pedestrian and bicycle
10 facilities, transit service, crash analysis, trip generation and distribution, access, sight
11 distance, capacity, weave analysis, queuing and signal warrant analysis. The report
12 concluded that all applicable standards are met without any mitigation for subdivision traffic
13 impacts.

14 At its June 16, 2008 hearing there was testimony from residents of the existing
15 residential area that the Highway 97/Coli Avenue intersection is dangerous and would be
16 made even more dangerous by the proposal. After the evidentiary phase of the local
17 proceedings was closed the city council directed planning staff to return with revised
18 findings that supported denial of the application based on the traffic safety concerns and
19 concerns about the closure of Byrd Avenue in the future. Record 37-38. Those revised
20 findings were prepared and provided to the city council. Record 20-30. At its July 7, 2008
21 meeting the city council adopted those revised findings and denied the application. Record
22 11-12. This appeal followed.

23 **FIRST ASSIGNMENT OF ERROR**

24 In its first assignment of error, petitioner alleges it was error for the city council to
25 direct the planning staff to revise its staff report. In support of its first assignment of error,
26 petitioner relies on City of Klamath Falls Community Development Ordinance (CDO)

1 11.820, which governs city review of requests for tentative subdivision plan approval and
2 provides in relevant part:

3 Within forty five (45) days of its decision, the [Planning] Commission shall
4 forward to the [City] Council a copy of such decision and any supporting
5 information. *The Council shall review the tentative plan, the report of the*
6 *staff and the decision of the Commission and may approve, modify or reject*
7 *the decision.* The Planning Director shall provide the developer with written
8 notice of the Council's action within five (5) days of such action. Such written
9 notice shall include findings relative to the above mentioned factors. * * *"
10 (Emphasis added).

11 Based on the emphasized language, petitioner argues:

12 “Nowhere in the Ordinance does it allow the Council to order the Planning
13 Department to alter its factual findings. The City Council can only exercise
14 those powers that are specifically granted to it. Only the Council, on the
15 record may approve, modify, or reject the decision of the Klamath Falls
16 Planning Commission. A change of the facts underlying that decision is not
17 permitted.” Petition for Review 5.

18 At the conclusion of its June 16, 2008 public hearing in this matter the city council
19 determined that it was not persuaded by the applicant’s evidence that traffic safety and fire
20 equipment access standards were met.¹ It directed planning staff to prepare revised findings
21 to support denial of the subdivision application. The planning staff did so, and at the July 7,
22 2008 meeting, the city council rejected the planning commission’s decision and adopted the
23 modified findings in support of that decision. We see no violation of CDO 11.820. As the
24 city points out it is common for local governing bodies to rely on their planning staffs to
25 prepare proposed findings for both planning commissions and rely on the same planning staff
26 to prepare findings to support the city council’s decision. See *Adler v. City of Portland*, 24
27 Or LUBA 1, 12-13 (1992) (“it is standard procedure for local government decision makers to
28 make a tentative decision and direct staff or the prevailing party to prepare a final written
29 decision and supporting findings for their review and adoption”). Since the city council’s

¹ We discuss those standards in our discussion of the third assignment of error.

1 decision may be different than the planning commission’s decision, it is not unusual that the
2 planning staff may have to draft findings that reach different conclusions and support
3 different results. Nothing in the text of CDO 11.820 prohibits what the city council did in
4 this case.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 In its second assignment of error, petitioner alleges the city council erred by
8 approving the amended findings without giving petitioner an opportunity to comment on the
9 amended findings.

10 Parties in a quasi-judicial land use proceeding have no right to rebut proposed
11 findings, absent local provisions to the contrary. *Sorte v. City of Newport*, 26 Or LUBA 236,
12 244-45 (1993); *Adler v. City of Portland*, 24 Or LUBA at 12. Petitioner cites no local
13 provisions that give it a right to comment on proposed findings. Petitioner has a right to
14 challenge the city council’s findings in this LUBA appeal, but petitioner had no local right to
15 rebut or challenge the city council’s findings.

16 The second assignment of error is denied.

17 **THIRD ASSIGNMENT OF ERROR**

18 Petitioner’s final assignment of error is a substantial evidence challenge. Under ORS
19 197.835(9)(a)(C), LUBA must reverse or remand a decision that is “not supported by
20 substantial evidence in the whole record.” However, petitioner is the applicant who had the
21 burden of proof below. Therefore, petitioner can prevail in a substantial evidence challenge
22 at LUBA only if petitioner establishes that the evidence in the record is such that a
23 reasonable decision maker could only conclude that relevant approval criteria are satisfied.
24 In other words, petitioner must establish that it carried its burden of proof, “as a matter of
25 law.” *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979);

1 *Applebee v. Washington County*, 54 Or LUBA 364, 384-85 (2007); *Oien v. City of*
2 *Beaverton*, 46 Or LUBA 109, 115 (2003).

3 **A. The Approval Criteria**

4 CDO 11.815(7) requires that a tentative subdivision plan must comply “with the
5 Comprehensive Plan and Chapters 10 to 14 and other applicable local and state regulations.”
6 City of Klamath Falls Comprehensive Plan (KFCP) Transportation Goal 29 requires the city
7 “[t]o develop and maintain a safe convenient, and economic transportation system.” CDO
8 11.805 sets out a long list of street standards. CDO 11.805(1) provides:

9 “The locations, width and grade of streets shall be considered in relation to
10 existing and planned streets, topographical conditions, to public convenience
11 and safety and to the proposed use of the land to be served by the streets. The
12 street system shall assure an adequate traffic circulation system. * * *”

13 As relevant here, these city standards require that the city, in reviewing an application for
14 tentative subdivision approval, must find that the street system that will serve the proposed
15 subdivision is “adequate” and “safe.”

16 KFCP Safety and Health Policy 216 provides that “[e]mergency vehicle access,
17 including ambulance, fire, police, and disaster services will be a principal criterion in
18 evaluating overall street plans.” Under this plan policy, fire vehicle access is a criterion by
19 which the overall street plan is evaluated.

20 **B. Fire Vehicle Access**

21 The city council found that petitioner failed to carry its burden of proof concerning
22 the emergency vehicle access criterion set out at KFCP Safety and Health Policy 216. The
23 city argues that petitioner does not assign error to the adequacy of those findings or to the
24 evidentiary support for those findings. Because those findings represent a separate
25 unchallenged basis for the city’s decision to deny the application, the city argues that its
26 decision would have to be affirmed even if LUBA agreed with petitioner that the city’s street
27 safety and adequacy findings are not supported by substantial evidence. *Lee v. City of*

1 *Oregon City*, 34 Or LUBA 691, 693-94 (1998); *Garre v. Clackamas County*, 18 Or LUBA
2 877, 881, *aff'd* 102 Or App 123, 792 P2d 117 (1990).

3 We agree with the city. Based on our agreement with the city, we need not consider
4 the third assignment of error further. However, the issues of emergency vehicle access and
5 street safety and adequacy were somewhat blended during the proceedings below and are
6 somewhat blended in the city council's decision. Therefore we also consider petitioner's
7 challenge to the evidentiary support for the city council's findings concerning the safety and
8 adequacy of the street system that would serve the proposed subdivision.

9 **C. Adequate and Safe Street System**

10 The city council found that petitioner failed to carry its burden of proof to
11 demonstrate that the proposed subdivision will be served by a safe and adequate street
12 system, as required by KFCP Transportation Goal 29 and CDO 11.805(1). Those findings
13 are set out in part below:

14 "Based on testimony of numerous residents in the area, the intersection of
15 Coli Avenue and HWY 97 is currently unsafe. Adding more traffic to that
16 intersection will cause the intersection to be even less safe. The applicant did
17 not propose or agree to any changes to the intersections that would address
18 traffic safety at the intersection. Although the traffic analysis provided by the
19 developer suggests there will be no significant impacts from this development
20 on the intersection, the anecdotal testimony of area residents, who regularly
21 use the intersection and have done so over a period of many years in some
22 cases, is more compelling and more accurate than the cursory investigation
23 and analysis conducted by the consultant. The conclusions of the traffic
24 consultant are not credible and are not being relied upon for the reasons set
25 forth in item 5 of the June 9, 2008 letter from the Davises and Fitzsimmonses,
26 which can be summarized as follows: a) the consultants had a very limited
27 time for traffic observations (as compared to the extensive observations of
28 local residents); b) the observations occurred when numerous users may have
29 been on vacation, thereby skewing the data; c) the study does not take into
30 consideration the close proximity of Coli Avenue to the HWY 97, HWY 39
31 intersection; and d) the study inappropriately excluded vehicles using the
32 HWY 97 crossover. The significance of these deficiencies is unclear, but the
33 extensive and credible testimony of local users is more compelling and
34 believable than the conclusions set forth in the traffic study." Record 4.

1 The city council’s findings go on to list additional safety concerns about the operation of the
2 Highway 97/Coli intersection.

3 Petitioner does not challenge the adequacy of the above-quoted findings. Petitioner
4 simply contends that the evidence that it prepared and submitted was prepared by experts,
5 and state and local transportation officials generally accepted the conclusions in the TIA.
6 According to petitioner it was therefore error for the city council to rely on lay testimony
7 from area residents instead of the evidence prepared by its experts.

8 Petitioner does not address or challenge the reasons the city gave in the above-quoted
9 findings for not accepting the conclusions in the TIA. There may be answers to each of the
10 criticisms the city council directed at the TIA, but petitioner does not identify what those
11 answers might be. Because petitioner does not challenge the reasons the city council gave
12 for not relying on petitioner’s evidence, petitioner’s evidentiary challenge must fail.

13 In addition, petitioner is simply wrong in arguing that it was necessarily improper for
14 the city council to rely on non-expert testimony from area residents regarding the safety and
15 adequacy of the Highway 97/Coli Avenue intersection, instead of the expert evidence that
16 was submitted by petitioner. Particularly where an approval standard calls for subjective
17 determinations, lay testimony can constitute substantial evidence, *i.e.* evidence a reasonable
18 person would believe, notwithstanding expert evidence that reaches a different conclusion.
19 *Ericsson v. Washington County*, 26 Or LUBA 169, 175 (1993); *Sellwood Harbor Condo.*
20 *Assoc. v. City of Portland*, 16 Or LUBA 505, 515 (1988); *McCoy v. Marion County*, 16 Or
21 LUBA 284, 290 (1987). Petitioner’s argument might have more merit if the approval
22 standard were a more technical transportation standard, such as OAR 660-012-0060.² But
23 the “safety” and “adequacy” approval standard here is not a technical standard, because the

² OAR 660-012-0060 is part of the Transportation Planning Rule and requires that comprehensive plan or land use regulation amendments that will “significantly affect an existing or planned transportation facility” must include certain measure to mitigate those affects. Under OAR 660-012-0060(1), whether an amendment will “significantly affect” a transportation facility must be determined by applying several technical inquiries.

1 KFCP and CDO provide no technical standards by which the city is obligated to determine
2 whether the streets are safe or adequate. The city's safety and adequacy approval standard is
3 subjective. In this case, both longtime area residents and the Fire District offered testimony
4 that a reasonable decision maker could have concluded was sufficient to demonstrate that the
5 Highway 97/Coli intersection is not safe or adequate and would be rendered less safe and
6 less adequate by the proposed subdivision. The TIA and other evidence offered by petitioner
7 are not sufficient to compel a different conclusion about the safety and adequacy of the
8 Highway 97/Coli intersection.

9 We reject petitioner's substantial evidence challenge.

10 The third assignment of error is denied.

11 The city's decision is affirmed.