BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA REINERT,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

LENNAR NORTHWEST, INC.,
Intervenor-Respondent.

LUBA No. 2016-049

FRIENDS OF JENNINGS LODGE,
KRIS BALLE and CAROL MASTRONARDE,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

LENNAR NORTHWEST, INC.,
Intervenor-Respondent.

LUBA No. 2016-051

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Dorothy S. Cofield, Portland, and William K. Kabeiseman, Portland, filed a joint petition for review and argued on behalf of petitioners. With them on the brief was Garvey Schubert Barer.

No appearance by Clackamas County.

Kelly S. Hossaini, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Miller Nash Graham & Dunn LLP.

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

AFFIRMED 10/13/2016

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision approving a 62-lot subdivision on land zoned R-10 Urban Low Density Residential (R-10).

FACTS

Intervenor-respondent Lennar Northwest, Inc. (intervenor) applied for approval of a subdivision on land zoned R-10 Urban Low Density Residential (R-10). The property is approximately 16.77 acres in size. The property contains hundreds of trees, mainly Douglas Fir. We take the following facts from the hearings officer's decision:

> "The subject property is located at 18121 SE River Road, Milwaukie, [Oregon] in what is known as the Jennings Lodge area. The property is bounded on the east by Southeast River Road (River Road) and on the south by Southeast Jennings Avenue (Jennings Avenue). The Willamette River is very close to the western boundary of the property, with only one lot separating the property from the river in many spots. The property is 16.77 acres and is zoned R-10. The property is currently developed with a number of structures including dwellings, an auditorium, and other structures that have been historically used as a retreat and meeting facility for the Pacific Conference of the Evangelical Church of North America. The property is generally level except for the western edge where it slopes sharply down towards the river. The property has been used as a retreat or meeting center for many years, and has accumulated numerous mature trees. The property is in the middle of a large area of R-10 zoned land east of McLoughlin Boulevard. McLoughlin Boulevard is a commercial area.
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> "The applicant previously submitted an application to rezone the property from R-10 to R-8.5. In conjunction with the zone change application, the applicant also sought approval for a 72-lot

> flexible lot subdivision and associated storm water outfall [R-8.5 Subdivision]. * * * The zone change application was denied because the approval criteria for a zone change were not satisfied [2015 Decision]. The subdivision and storm water aspects of the application were also denied because they were based on R-8.5 zoning of the property. The merits of the subdivision and storm water aspect of the application were not considered because the zone change was denied. That decision is currently on appeal to the Land Use Board of Appeals (LUBA).[1]
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> "The current application proposes to subdivide the property into 62 lots [R-10 Subdivision]. The proposed lot sizes range in size from 8,041 square feet to 19,436 square feet. The proposal includes a restricted development area along the western edge on the property where it slopes down towards the Willamette River. Due to objections regarding opposite street frontage regarding some of these lots, an open space tract has been proposed for some of the western lots. The application also proposes a series of swales along the internal streets and rain gardens on individual lots to provide infiltration and treatment of storm water. The proposed out fall to the Willamette River would only be used for overflow events. The property contains hundreds of trees, including many large Douglas firs. The proposed subdivision would preserve most of the trees along the western boundary of the property, but almost all of the trees in the middle of the property where the roads, utilities, and building footprints are proposed would be removed." Record 2-3.

After a public hearing on the R-10 Subdivision application, the hearings officer approved the application, and these appeals followed.

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[1] *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016), *aff'd* 280 Or App 456, __ P3d __ (2016).

FIRST ASSIGNMENT OF ERROR

Clackamas County Zoning and Development Ordinance (ZDO) 1307.16(K) provides in relevant part:

> "Re-filing an Application: If a Type II or III land use permit application is denied, * * * an applicant may re-file for consideration of the same or substantially similar application only if:
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> "1. At least two years have passed after either final denial of an application by the County or revocation of a permit; or
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> "2. The review authority finds that one or more of the following circumstances render inapplicable all of the specific reasons for the denial:
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> "a. A change, which is material to the application, has occurred in this Ordinance, the Comprehensive Plan, or other applicable law; for the purposes of this provision, "change" includes amendment to the applicable provisions or a modification in accepted meaning or application caused by an interpretation filed pursuant to Section 1308;
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> "b. A mistake in facts, which was material to the application, was considered by the review authority;
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> "c. There have been changes in circumstances resulting in new facts material to the application;
>
> "d. A change has occurred in the zoning of the subject property, or adjacent property, that substantially affects the merits of the application; or
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> "e. There have been substantial changes in the surrounding area, or on the subject property, such as availability of services or improvements to public facilities, that affect the merits of the application."

During the proceedings below, petitioners argued that ZDO 1307.16(K)(1) prohibited intervenor from seeking approval of the R-10 Subdivision because the R-10 Subdivision is "substantially similar" to the R-8.5 Subdivision that the hearings officer previously denied.

In his decision, the hearings officer first noted that the 2015 Decision did not apply any of the applicable subdivision development standards and criteria in the ZDO, because the R-8.5 Subdivision application sought approval of a subdivision on land zoned R-8.5, and could not be approved because the hearings officer denied the zone change application. Accordingly, he concluded, the 2015 Decision did not deny the R-8.5 Subdivision on the merits of the application. Record 5. However, the hearings officer also agreed with petitioners' argument that the language of ZDO 1307.16(K) does not preclude a "substantially similar" application only if the first application is denied "on the merits." Record 7 ("while that is true, I do not see that that resolves the issue"). He therefore addressed whether the applications are "substantially similar" within the meaning of ZDO 1307.16(K), and concluded that the applications are not "substantially similar."

Henkel v. Clackamas County, 56 Or LUBA 495 (2008), involved the same ZDO provision at issue in the present appeal, although the provision has been renumbered. In ascertaining whether the hearings officer correctly interpreted the phrase "substantially similar" for purposes of that appeal, we explained:

"* * * The phrase 'substantially similar' is not defined in the ZDO. We therefore look to its ordinary meaning. *DLCD v. Columbia County*, 24 Or LUBA 338, 339-40 (1992).

"Black's Law Dictionary defines 'similar' as:

> "'Nearly corresponding; resembling in many respects; somewhat alike; having a general likeness, although allowing for some degree of difference. Word 'similar' is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form or substance, although in some cases 'similar' may mean identical or exactly alike. It is a word with different meanings depending on context in which it is used.' *Black's Law Dictionary*, 6th Ed. (1990) 1383.

"As petitioner notes, the definition of 'similar' gives little clue as to the degree to which two things can have differences and still be considered similar. The operative phrase, however, also includes the word 'substantially' which is defined as:

> "'Essentially; without material qualification; in the main; in substance; materially; in a substantial manner. About, actually, competently, and essentially.' *Id*. at 1428-29.

"By preventing the refiling of applications that are 'substantially similar' the ZDO requires a greater degree of similarity than would be required if the standard were merely 'similar' applications. In other words, applications must not only be similar, they must be very similar. We agree with petitioner that the plain meaning of 'substantially similar' is that under ZDO 1305.02(H) a second application is barred within two years of the first application's denial only when there is a high degree of similarity." 56 Or LUBA at 501.

In *Henkel*, we concluded that the hearings officer's interpretation of the phrase "substantially similar" was not correct, and that the two applications for home

occupation permits at issue did not involve a high degree of similarity and therefore were not "substantially similar." *Id*. at 502.

Relying on and applying our decision in *Henkel*, the hearings officer interpreted the phrase "substantially similar" as requiring a high degree of similarity, and concluded that the two subdivision applications did not involve a high degree of similarity. The hearings officer found that the decrease in the number of lots from 72 to 62, the increase in the average size of the lots by almost 2,000 square feet per lot, a decrease in the amount of traffic and the amount of stormwater generated by the R-10 Subdivision, and the elimination of the zone change application meant that the R-10 Subdivision application was not "substantially similar" to the R-8.5 Subdivision application.

Petitioners challenge the hearings officer's conclusion. According to petitioners, the hearings officer wrongly construed ZDO 1307.16(K) because the applications are "substantially similar."[2] Petitioners point out that both

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[2] The challenged decision is a "limited land use decision" as defined in ORS 197.015(12), and accordingly we review the decision according to ORS 197.828, which provides:

> "(1) The Land Use Board of Appeals shall either reverse, remand or affirm a limited land use decision on review.
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> "(2) The board shall reverse or remand a limited land use decision if:
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> "(a) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds

involve "large lot" subdivisions with over 60 lots, with similar layout of streets and utilities, where the use of the property is residential. Petition for Review 10-11. Petitioners also argue that the circumstances enumerated in ZDO 1307.16(K)(2)(d) and (e) provide context for interpreting the phrase "substantially similar" and examples of applications that would not be "substantially similar." Petitioners argue that context provided in ZDO 1307.16(K)(2)(d) and (e) suggests that the phrase should be interpreted to mean that only where the zoning of a property has changed, services have become available, or improvements to public facilities have occurred, are two applications not "substantially similar." Petitioners argue that because the zoning has not changed in any way that substantially affects the merits of the application, and no new services have become available and no improvements to public facilities have occurred, the two applications are substantially similar.

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for reversal or remand if there is evidence in the record to support the final decision;

"(b) The decision does not comply with applicable provisions of the land use regulations;

"(c) The decision is:

"(A) Outside the scope of authority of the decision maker; or

"(B) Unconstitutional; or

"(d) The local government committed a procedural error which prejudiced the substantial rights of the petitioner."

Finally, petitioners argue that *Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or App 359, 129 P3d 702 (2006), requires the hearings officer to conclude that the two applications are substantially similar.[3]

Intervenor responds that the hearings officer's interpretation of the phrase "substantially similar" is correct, and that he correctly concluded based on the evidence in the record that the two applications are not "substantially similar" within the meaning of ZDO 1307.16(K). Intervenor responds that *Wal-Mart* is inapposite in the present appeal, because *Wal-Mart* involved a different jurisdiction and differently worded code provision than the one at issue in the present appeal.

We agree with intervenor that *Wal-Mart* is inapposite in the present appeal. The hearings officer is not bound by a different local government's interpretation of its own land use regulation that is differently worded than the regulation at issue. In addition, *Wal-Mart* involved a deferential standard of review that is not present in reviewing a hearings officer's code interpretation.

We review the hearings officer's interpretation to determine whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 276, 752 P2d 323 (1988). Our decision in *Henkel* is applicable precedent. Applying *Henkel*, the hearings

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[3] In *Wal-Mart*, the Court of Appeals concluded that LUBA erred in failing to affirm the city council's interpretation of the city's "substantially similar" language, under the deferential standard of review that applies to LUBA's review of a governing body's code interpretation, at ORS 197.829(1). *Wal-Mart*, 204 Or App at 364-65.

officer correctly construed the phrase "substantially similar" in ZDO 1307.16(K) as requiring a high degree of similarity, and correctly applied that interpretation to allow intervenor to submit the R-10 Subdivision application, because of the many ways in which that R-10 Subdivision application does not have a high degree of similarity to the R-8.5 Subdivision application. The R-10 Subdivision application results in a subdivision on land zoned R-10, not R-8.5; an approximately 15% decrease in the number of lots; an approximately 20% increase in average lot size; a decrease of approximately 100 daily vehicle trips; an increase in on-street parking; and wider streets in some areas. The two applications, therefore, do not involve a high degree of similarity. The hearings officer's decision "compl[ies] with applicable provisions of the [ZDO.]"[4] ORS 197.828(2)(b).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ZDO Chapter 1002 "implement[s] the policies of the [Clackamas County] Comprehensive Plan [CCCP] for the protection of natural features." ZDO 1002.04, "Trees and Wooded Areas," provides in relevant part:

> "A. Existing wooded areas, significant clumps or groves of trees and vegetation, consisting of conifers, oaks and large

[4] To the extent the hearings officer also interpreted the phrase "[the] application is denied" in ZDO 1307.16(K) to mean "denied" based on a decision that an application fails to satisfy one or more approval criteria that apply to the subdivision, we think that interpretation is correct.

deciduous trees, shall be incorporated in the development plan wherever feasible. *The preservation of these natural features shall be balanced with the needs of the development, but shall not preclude development of the subject property, or require a reduction in the number of lots or dwelling units that would otherwise be permitted.* Site planning and design techniques which address incorporation of trees and wooded areas in the development plan include, but are not limited to, the following: * * *."[5] (Emphasis added.)

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[5] The site planning and design techniques listed in ZDO 1002.04(A)(1)-(10) are:

"1. Siting of roadways and utility easements to avoid substantial disturbance of significant clumps or groves of trees;

"2. Preservation of existing trees within rights-of-way and easements when such trees are suitably located, healthy, and when approved grading allows;

"3. Use of flexible road standards as provided in Subsection 1007.04(B)(3), including one-way roads or split-level roads, to preserve significant trees and avoid unnecessary disturbance of terrain;

"4. Retention of specimen trees or clumps of trees in parking area islands or future landscape areas of the site as provided for in Section 1009.

"5. Use of wooded areas of the site for recreation, or other low-intensity uses, or structures, not requiring extensive clearing of large trees, grading, or filling activity which substantially alters the stability or character of the wooded area;

"6. Retention of trees which are necessary to ensure the stability of clumps or groves of trees considering the type of trees,

The property contains 423 trees, the majority of which are in stands that are scattered throughout the property. Intervenor's R-10 Subdivision would preserve approximately 90 of the 423 trees on the property, most of which would be along the steeper western boundary of the property. The development would remove 326 trees, mostly located in the middle of the property. The development would also plant 317 new trees in locations where they can safely grow and survive. Record 1005. As we explain in more detail below, the hearings officer found that intervenor's R-10 Subdivision application satisfies ZDO 1002.04(A) and that no additional trees beyond the 90 proposed were required to be preserved.

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soil and terrain conditions, exposure to prevailing winds, and other site-specific considerations;

"7. Use of trees and wooded areas to buffer, screen, or provide transitions between different or conflicting uses on and off the site;

"8. Use of flexible-lot-size and planned unit development designs to minimize disturbance of wooded areas;

"9. Siting of uses and structures to utilize the natural microclimates created by wooded areas and trees to reduce extremes in temperature, provide wind protection, filter pollutants, and replenish oxygen and moisture to the air; and

"10. Use of other development techniques described in Subsection 1011.03(C)."

A. Siting and Design Techniques - ZDO 1002.04(A)(1)-(10)

In their second assignment of error, petitioners first argue that the hearings officer improperly interpreted ZDO 1002.04(A) as not requiring additional tree preservation if tree preservation would require the number of lots to fall below 62, or if additional tree preservation is not feasible considering the needs of the development.[6] According to petitioners, the focus of the provision is preservation of trees, and not on preserving development rights. In support, petitioners argue that the placement of the tree preservation language in the first sentence of ZDO 1002.04(A) clarifies its importance, and cite provisions of the CCCP that relate to requiring or encouraging tree preservation through regulation and education to demonstrate that tree preservation is required. CCCP Chapter 3, Natural Resources and Energy.

In addition, we understand petitioners to argue that the hearings officer erred when he interpreted the phrase "shall not * * * require a reduction in the number of lots or dwelling units *that would otherwise be permitted*" in ZDO 1002.04(A) to mean the number of lots that would be permitted absent any tree preservation requirement. According to petitioners, that phrase must be interpreted in context with the minimum and maximum density provisions in ZDO 1012. As we understand their argument, it is that the number of lots "that would otherwise be permitted" on the property is not necessarily the number of

[6] We understand petitioners to argue that the "decision does not comply with the applicable land use regulations." ORS 197.828(2)(b).

lots permitted under the maximum density provisions and could be the minimum number of lots that intervenor could seek to develop under the minimum density requirements in ZDO 1012.[7]

The hearings officer found that the text of ZDO 1002.04(A) does not require tree preservation where tree preservation would result in a reduction in the number of lots that would otherwise be developed, or where it is not "feasible." Record 12. The hearings officer concluded that intervenor had relied on some of the alternative siting and design techniques in ZDO 1002.04(A)(1)-(10) (namely (1), (7) and (8)), and that ZDO 1002.04(A) does not require intervenor to demonstrate that it has attempted to redesign the project using all possible techniques listed or explain the reasons why all possible techniques will not meet the needs of the development.

The hearings officer also rejected petitioners' argument that alternative designs submitted by petitioners prove that intervenor could design the subdivision to preserve more trees. He explained that intervenor's expert analyzed every alternative design that petitioners offered to demonstrate that

[7] According to intervenor, 62 lots is the maximum number of lots that could be developed on the property in compliance with the maximum density, lot area, and setback requirements in the ZDO. Response Brief 22-23. Accordingly, as we understand petitioners' argument, some number less than 62 lots could be developed in conformance with the minimum density variation set out in ZDO 1012.08(D), which would result in fewer, but larger lots. However, nothing in the petition for review specifies the number of lots that could be developed in compliance with the minimum density variation that applies to the R-10 zoning district.

more trees could be preserved, and he concluded that all of the alternatives either resulted in a reduction in the number of lots to less than sixty-two, or resulted in 62 lots in a subdivision that failed to satisfy road and lot size standards and therefore could not be approved. Record 14, 188-89.

Next, the hearings officer rejected petitioners' apparent argument that the phrase "number of lots that would otherwise be permitted" means number of lots that could be developed relying on the minimum density standards in ZDO 1012. Instead he concluded that the text of ZDO 1002.04(A) focuses on the number of lots that would be "otherwise * * * permitted" *in the absence of protection of trees* that might be achieved through application of ZDO 1002.04(A), and that it does not refer to the lowest number of lots that a developer could develop based on density variations. Record 14.

We agree with intervenor that the hearings officer's interpretation of ZDO 1002.04(A) is correct. *McCoy*, 90 Or App at 276. The express language of ZDO 1002.04(A) makes clear that the hearings officer must balance tree preservation with the needs of the development, and makes tree preservation necessary only when that preservation (1) would not reduce the number of lots that are permitted, and (2) is "feasible" given the "needs of the development." Petitioners' reading of ZDO 1002.04(A) and reliance on context provided by provisions of the CCCP is simply inconsistent with the express language of ZDO 1002.04(A).

In addition, we agree with intervenor that after intervenor demonstrated that alternative designs proposed by petitioners that could preserve more trees would either reduce the number of lots or would make the subdivision infeasible because it could not satisfy road and lot standards, the hearings officer was correct in not requiring intervenor to preserve more trees than the 90 it proposed to preserve.

Finally, petitioners also argue the hearings officer should have required intervenor to demonstrate that development as a planned unit development (PUD) under ZDO Chapter 1013 was not a "feasible" method of achieving tree preservation, could not meet the needs of the development, or would require a reduction in the number of lots to less than 62. Petitioners argue that ZDO 1002.04(A)(8) requires intervenor to submit an alternative layout that shows the development as a PUD to demonstrate that developing the property as a PUD is not "feasible."

The hearings officer concluded that a PUD is not one of the design techniques listed in ZDO 1002.04(A)(1) – (10). That conclusion was incorrect, because a PUD is listed as a potential design technique in ZDO 1002.04(A)(8). However, in other parts of the decision, the hearings officer concluded that intervenor was not required to prove in the first instance that a PUD would not meet the needs of the development, would be infeasible, or would result in a reduction in the number of lots. Stated differently, the hearings officer interpreted ZDO 1002.04(A) as not requiring a showing by intervenor that each

and every design technique listed in (1) through (10), including a PUD, has been considered, or an explanation of why every design technique is not feasible. Record 13 ("an applicant need not generate multiple alternatives just to shoot them down to comply with ZDO 1002.04(A)."). That interpretation is correct. Accordingly, the hearings officer's incorrect statement regarding ZDO 1102.04(A)(8) is, at most, harmless error, because petitioners' argument rests on their argument that ZDO 1002.04(A) requires that a subdivision developer must demonstrate that it has considered a PUD and prove that it is infeasible.[8]

B. Substantial Evidence

Also in their second assignment of error, petitioners argue that the hearings officer's conclusion that ZDO 1002.04(A) is met is not supported by substantial evidence in the record. ORS 197.828(2)(a) provides in relevant part that for a substantial evidence challenge to a limited land use decision:

> "The board shall reverse or remand a limited land use decision if: * * * [t]he decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a

[8] Petitioners cite Record 765 and argue that petitioners "showed that it is likely a PUD could have protected trees along Jennings Avenue in a 'Tree Preservation Tract' of one and one-half acres, yielding more than the 62 lots [intervenor] applied for in its R-10 application." Petition for Review 23. Record 765 is a version of the R-8.5 Subdivision containing 72 lots, marked up by someone to remove 9 lots along Jennings Avenue from it to create a "tree preservation tract." Record 765, and the letter it is attached to, do not include the words "planned unit development," refer to any applicable criteria in ZDO Chapter 1013, Planned Unit Development, or otherwise attempt to establish that it is a proposal for a PUD.

different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision."

In *Truth in Site v. City of Bend*, 71 Or LUBA 348 (2014), *aff'd* 273 Or App 820, 362 P3d 1215, *rev den* 358 Or 527, 366 P3d 1168 (2015), we explained:

> "LUBA's standard of review of evidentiary challenges to a limited land use decision is not the same as the standard of review of a land use decision. The language of ORS 197.828(2)(a), as compared to ORS 197.835(9)(a)(C), does not include the phrase 'substantial evidence in the whole record.' For limited land use decisions, LUBA may not reverse or remand a limited land use decision unless 'the decision is not supported by substantial evidence in the record.' Under ORS 197.828(2)(a), in determining whether the decision is 'supported by substantial evidence in the record,' LUBA may not remand a decision on the basis that there exists evidence in the record supporting a different decision.
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> "The legislative history of the bill that was eventually codified at ORS 197.828 also supports the conclusion that the legislature intended LUBA's standard of review of evidentiary challenges to limited land use decisions to be different from, and likely less rigorous than, the standard of review of challenges to land use decisions. But the express language of ORS 197.828(2)(a) and the legislative history we have reviewed do not articulate how substantial evidence review under ORS 197.828(2)(a) differs from substantial evidence review under ORS 197.835(9)(a)(C)." 71 Or LUBA at 363-64.

As was the case in *Truth in Site*, we need not define the precise nature of substantial evidence review of a limited land use decision under ORS 197.828(2)(a) here. That is so because even under what is a more rigorous standard of review at ORS 197.835(9)(a)(C), we conclude that a reasonable

decision maker could conclude in this case, based on the evidence in the record submitted by intervenor and intervenor's experts, that ZDO 1002.04(A) is met.

Intervenor submitted a tree plan prepared by its arborist that indexed each of the 423 trees on the property, including its size, species, health, and proposed disposition under the subdivision plan, including one or more reasons for the proposed disposition. The majority of the trees on the property are located in stands, and intervenor's arborist opined that trees growing in stands have difficulty surviving as individual trees. Record 1102-04. Petitioners do not point to any evidence that calls that opinion into question.

Petitioners point to evidence in the record submitted by petitioners' arborist, which analyzed the previous R-8.5 Subdivision application, that took the position that one of the stands of trees adjacent to Jennings Avenue could be preserved by developing the property as a PUD, by reducing street widths and removing off-street parking, or with other unspecified "minor adjustments to the proposed site design."[9] Record 685-86. Intervenor's arborist responded to petitioners' evidence by analyzing each of the alternative site plans submitted by petitioners and explaining why they were not feasible. Record 228, 235-38. In addition, intervenor's arborist responded by questioning the completeness and reliability of petitioners' arborist's submittal, given that it

[9] That submission is dated August 18, 2015, prior to the filing of the R-10 Subdivision application, which was filed on January 22, 2016. Record 684, 1011.

was submitted in response to the R-8.5 Subdivision application, and did not analyze the R-10 Subdivision application materials. Record 228. Intervenor's expert responded to petitioners' expert's analysis of a previous subdivision application, and intervenor's tree plan and responses to petitioners' experts are evidence that a reasonable decision maker would rely on to find that ZDO 1002.04(A) is met.

The second assignment of error is denied.

DISPOSITION OF STAY

In an Order dated May 13, 2016, we granted petitioners' motion requesting a stay of the hearings officer's decision pending a final opinion by LUBA in this appeal. With the issuance of this order, our stay is dissolved. *Meyer v. Jackson County*, 73 Or LUBA 1, 26 (2016); *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335, 342 (1995).

The county's decision is affirmed.