

1 Opinion by Bagg.

2 NATURE OF DECISION

3 Petitioner appeals Jackson County Order No. 72-87 denying
4 its application for a conditional use permit. Petitioner asks
5 that we reverse the county's decision, require the county to
6 grant approval of petitioner's request, and award petitioner
7 reasonable attorney's fees.

8 FACTS

9 The requested conditional use permit would authorize
10 accessory commercial sales in conjunction with a farm use and
11 nursery, in an exclusive farm use zone. The applicant, Valley
12 View Nursery, seeks to expand and sell fertilizer, bark mulch,
13 irrigation supplies, landscape materials, garden tools, and
14 other related supplies along with nursery stock.

15 The nursery now consists of 31 acres, upon which there
16 exists a residence, a barn, workshop, a storage shed and 16
17 greenhouses. A portion of the property is used for grazing
18 livestock.

19 The property is located on Valley View Road, which
20 intersects with Interstate 5, a mile and one quarter away. The
21 capacity of the road is 6,000 vehicles per day, but only some
22 357 vehicles a day drive Valley View Road. The road ends
23 beyond petitioner's property.

24 The Jackson County Planning Department recommended approval
25 of the application with certain conditions, including a limit
26 that no more than 15% of petitioner's total business be devoted

1 to the accessory sales use. The county planning department
2 issued written notice of an intent to approve the application,
3 but upon request of an individual in the community, the matter
4 was scheduled for hearing before the board of county
5 commissioners. The board voted to deny the request and issued
6 its order on April 1, 1987. This appeal followed.

7 FIRST ASSIGNMENT OF ERROR

8 "Jackson County's Order and Findings are Not Supported
9 By Substantial Evidence in the Whole Record."

10 SECOND ASSIGNMENT OF ERROR

11 "Jackson County's determination that the application
12 did not meet the criteria of section 260.040 of the
13 county's land development ordinance was in error and
14 lacked evidentiary support. Petitioner demonstrated
15 compliance with all applicable criteria. There was no
16 legal or factual basis for denying petitioner's
17 application."

18 COMBINED DISCUSSION

19 Petitioner asserts, and the respondents do not deny, that
20 Valley View Nursery's operation is a "farm use" within Section
21 00.040 Jackson County Land Development Ordinance.¹
22 Petitioner says that under county ordinance Section 218.040, the
23 county has little choice but to approve commercial activities
24 in conjunction with farm use. The ordinance provides, in
25 pertinent part:

26 The following uses are permitted if in conformance
with Section 218.060, and other pertinent sections of
this ordinance:

"1) Commercial activities that are in conjunction
with farm use."

Petitioner argues that the present nursery operation falls

1 within permitted farm uses and that much of the county's
2 complaints about adverse effects of the proposed conditional
3 use are simply the effects of permitted farm uses. Petitioner
4 does not dispute, however, that the sale of farm related
5 products, including garden tools and chemicals, is not a farm
6 or agricultural use. In order to sell such items, the nursery
7 needs a conditional use permit.²

8 Petitioner correctly notes the county's denial was based on
9 Section 260.040, setting forth standards for all conditional
10 uses regardless of zoning district. Specifically, the county
11 relied on Section 260.040(2) which provides:

12 "2) That the location, size, design, and operating
13 characteristics of the proposed use will have
14 minimal adverse impact on liveability, value, or
appropriate development of abutting properties
and the surrounding area."

15 The county found adverse impacts resulting from the
16 conditional use. The first of these is automobile and truck
17 traffic impact. The county found

18 "Members of the public, including Mr. Cockrell and Mr.
19 and Mrs. Curtis, testified that commercial accessory
20 sales as proposed by the applicant will significantly
21 add to the traffic on Valley View Road in the
22 relatively quiet and rural area around Valley View
23 Nursery based on the calculation that local retail
24 nurseries involved in commercial sales similar to
25 those commercial sales proposed by the applicant draw
26 between 150 and 300 cars per day during the peak
season. The Board of Commissioners finds that the
commercial sales as proposed would materially increase
traffic to the sales destination."

"The Board also finds that commercial accessory sales
as proposed will increase heavy freight truck traffic,
which freight truck traffic would be generated from a
need to stock and maintain a retail inventory." R3.

1 From this finding, the county concluded that the traffic also
2 had an effect on noise levels. Particularly, the county noted
3 that truck freight traffic along with other noise producing
4 activities, "would disrupt the rural and quiet quality of life
5 permitted in this zone and would therefore be more than minimal
6 adverse impact on the liveability and value of the surrounding
7 area." Record 5.

8 Petitioner complains that evidence in the record does not
9 support the county's view that the increase in traffic is a
10 result of the activities planned under the conditional use, but
11 rather the traffic impacts are the result of retail sales of
12 nursery stock. The sale of nursery stock is, under the
13 county's ordinance, a permitted use. Petitioner's point is
14 that the county is complaining about activities which are
15 permitted on the property, not upon those planned under the
16 conditional use application.³

17 The county insists the record reveals substantial evidence
18 that traffic will increase and that it will adversely affect
19 the surrounding area. Respondent cites the testimony of an
20 experienced nurseryman who said that during the peak season, a
21 retail nursery of the kind proposed could expect from 300 to
22 600 cars a day. Record 27. The county also points to evidence
23 in the record that the nursery will involved a considerable
24 amount of commercial truck traffic. The increased truck use
25 results from importation of items to be sold at retail,

1 according to the respondent. See Record 22, 34, 37, 131-2 and
2 Testimony of Eric Baron, Exhibit A, Page 3.

3 The testimony of the owner of a garden center, Record 27,
4 and from neighbors of the proposed use is substantial evidence
5 to support the county's conclusion that traffic would increase,
6 would include heavy truck traffic, and would thereby result in
7 more than a minimal impact on the area.⁴ The fact the
8 petitioner and the applicant disagree on the testimony and on
9 whether, indeed, the information testified to is correct or
10 false does not, in this case, render the county's reliance on
11 the testimony not substantial. Substantial evidence is that
12 evidence a reasonable person would rely upon as sufficient to
13 make a decision, and we believe that standard is met here.

14 Younger v. City of Portland, 86 Or App 211, ___ P2d ___ (1987);
15 Christian Retreat Center v. Board of County Commissioners for
16 Washington County, 28 Or App 673, 560 P2d 1100 (1977).

17 Petitioners next complain the county's findings regarding
18 noise impacts are not supported by substantial evidence in the
19 record.⁵ Further, petitioner complains that the county's
20 reliance on the adverse effects of the applicant's use of a
21 loudspeaker system is in error. Petitioner asserts there is no
22 evidence in the record linking use of the sound system to the
23 sale of accessory items. A loudspeaker paging system is now in
24 use in the operation.

25 The county's finding is as follows:

26 "Noise Levels. Noise levels from the increased

1 traffic and from the loudspeaker. The area
2 surrounding Valley View Nursery is a quiet rural
3 area. Valley View Road at the nursery location has at
4 present relatively little traffic. Therefore, noise
5 levels from permitted farm activities are
6 insignificant. However increased traffic,
7 particularly truck freight traffic with heavy engines,
8 and the loudspeaker used for paging employees would
9 disrupt the rural and quiet quality of life permitted
10 in this zone and would therefore be more than a
11 minimal adverse impact on the livability and value of
12 the surrounding area."

13 Respondent argues that "it is not unreasonable to conclude
14 that large numbers of cars and trucks make noise." Brief of
15 Respondent County at 14. Respondent cites testimony in the
16 record that the 300-600 car trips per day along Valley View
17 Road, in the peak season, will result in a breakdown of from 75
18 cars passing "one's home every hour, or one car every 45
19 seconds." See Record point 7. The county also cites testimony
20 of opponents, attributing use of the public address system to
21 sales of items permitted under the conditional use. See Record
22 37, Record 131, and Record Supplement Testimony of McKenzie,
23 Exhibit D, Page 3.

24 Respondent states the record shows much of the material
25 sold at the site is not raised or grown on the site. Record
26 Supplement Testimony of Eric Baron, Exhibit A, Page 2.

Respondent then states:

"Thus, it is not a quantum leap to find that the
telephone is an intricate part of the conditional use
as applied for. Extensive use of the telephone means
that people will have to be paged to answer it, and
the ringing sound of the telephone is amplified so as
to hear it. It is this loud ringing and the paging of
employees that was found to be so offensive by the
neighboring community."

1 Brief of Respondent County at 16-17. See testimony of John
2 McKenzie, Exhibit D, Page 3.

3 The record is not clear as to how much more use would be
4 made of the loudspeaker system after the grant of the
5 conditional use permit. While we can agree with respondent's
6 argument in the brief that no "quantum leap" is necessary to
7 understand that increased use of the telephone and paging
8 through the loudspeaker system may subject the area to
9 increased noise, the county order does not make the factual
10 link between the conditional use permit and use of the
11 loudspeaker system. The order includes insufficient facts from
12 which to conclude (1) an increase in paging system use will
13 occur and (2) the increased use will have more than minimal
14 impact on the area.

15 Petitioner next quarrels with the third basis for denial.
16 The county found there will be visual degradation of the area
17 as a result of use of greenhouses for purposes other than
18 growing stock, increases in traffic, construction of a parking
19 lot, and advertising signs. Petitioner complains that the
20 county's findings are really about uses already existing in
21 connection with the primary agricultural use and, therefore,
22 permitted under the Ordinance.

23 Respondent argues that whether or not petitioner already
24 engages in some of the activities complained about does not
25 legitimize these activities. See Lemmon v. Clemens, 57 Or App
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1 583, 646 Pacific Sec 630(3) 1982.⁶ Respondent states
2 petitioner's argument is, essentially, that a retail business
3 under the conditional use permit will not be noticeable because
4 the activities are already occurring. Respondent argues that
5 this rationale is "circular reasoning" and does not demonstrate
6 that petitioner complies with Ordinance criteria.

7 The county's findings in this issue are as follows:

8 "Visual Degradation. Visual degradation would result
9 from the numerous coldframe greenhouses used for
10 purposes other than propagation of stock. Visual
11 degradation would also result from increases in
12 traffic and from two large parking lots. Visual
13 degradation would also result from the signs that are
14 proposed for advertising the commercial products sold.
15 These visual impacts are impacts that are not
16 associated with permitted uses on Exclusive Farm Use
17 land and the Board finds that they should not be
18 permitted as a conditional use of Exclusive Farm Use
19 land because they would more than minimally adversely
20 impact the livability and value of the surrounding
21 area. This is because visually the nursery would as
22 proposed, have a commercial appearance more similar to
23 a grange affair than a permitted use of Exclusive Farm
24 Use land. All of these adverse impacts are generated
25 from the commercial attributes of the nursery as
26 proposed which commercial attributes are not permitted
farm uses. The Board finds that the location, size,
design and operating characteristics of the Valley
View business when engaged in commercial sales as
proposed would create a commercial character that is
inconsistent with and detrimental to the established
farm and landed residential uses found in the
surrounding area." Record 5-6.

21 The county order gives no explanation as to why use of cold
22 frame greenhouses "for purposes other than propagation of
23 stock" results in visual degradation. The mere fact the use of
24 the greenhouses will change provides no clue as the county's
25 reason for the conclusion that visual degradation will result.

1 Similarly, the county does not explain why "two large
2 parking lots" will result in visual degradation.⁷ It is
3 unclear whether the parking lots are now in existence, will be
4 modified, will be resurfaced or otherwise changed as a result
5 of the issuance of a conditional use permit. At a minimum, the
6 county needs to articulate why the parking lots, which would
7 appear to be permitted as an adjunct to the farm use, will
8 result in visual degradation should the conditional use permit
9 issue. This explanation is lacking.

10 The same defect may be seen in the county's conclusion that
11 advertising signs will result in visual degradation. There is
12 no description of any signs planned for the proposed
13 conditional use, nor is there a discussion about how the visual
14 character of the area will change as a result of the signs.
15 Further, there is no discussion about what signs, if any, are
16 permitted now in conjunction with the farm and agricultural use
17 existing on the property.

18 In summary, the county's conclusion that the nursery will
19 take on an appearance similar to a grange may be accurate, but
20 the facts supporting such a conclusion are missing from the
21 county's order. Under these circumstances, the applicant is
22 left having little idea as to what changes in the application
23 are necessary in order to meet with approval. Commonwealth
24 Properties v. Washington County, 75 Or App 387, 582 P2d 1384
25 (1978).

26 However, the defects in this portion of the county's order

1 do not result in remand. Providing there is sufficient reason
2 for denial adequately explained in the findings and supported
3 by substantial evidence, the denial will be sustained. Cite
4 Cook v. City of Eugene, ___ Or LUBA ___ (LUBA No. 86-088,
5 April 7, 1987). In this case, the county's discussion of
6 traffic and the adverse effects of the traffic is sufficient to
7 support the county's decision.

8 In this regard, we note the county's ordinance provides
9 considerable discretion in considering whether the proposed
10 conditional will produce more than "minimal" impacts on the
11 area as required under the county's ordinance. The county
12 believes the impacts from the traffic to be more than minimal,
13 considering the character of the surrounding area. LUBA is not
14 empowered to substitute our judgment for the county's on
15 matters of aesthetics and ordinance interpretation, providing
16 the county's interpretation is reasonable. The county's
17 decision with respect to traffic impacts is within the confines
18 of the Ordinance and is reasonable. Alluis v. Marion County,
19 64 Or App 478, 688 P2d 1242 (1983).

20 Lastly, petitioner asserts that it complies with all
21 comprehensive plan and land development ordinance criteria.
22 Therefore, according to petitioner, it is entitled to issuance
23 of the permit. See ORS 197.835(9). Because of the discussion
24 above regarding the county's interpretation of its approval
25 criteria and the evidence available in the record to support
26 the decision, LUBA disagrees with petitioner's conclusion.

1 Petitioner is not entitled to issuance of the permit as claimed.

2 The first and second assignments of error are sustained, in
3 part, but no remand or reversal results from this holding.

4 THIRD ASSIGNMENT OF ERROR

5 "Jackson County exceeded its range of discretion by
6 denying an application for a use allowed in an EFU
7 zone, where such application met all applicable
8 criteria."

9 Petitioner argues that the county does not have discretion
10 to deny a conditional use under provisions of its Ordinance.
11 Petitioner relies on Jackson County Land Development Ordinance
12 Section 218.040 allowing commercial uses in conjunction with
13 farm use upon a showing of compliance with applicable
14 criteria. Petitioner's argument is that it complies with all
15 applicable criteria.

16 Because of the holding under assignments of error one and
17 two, LUBA concludes that under these circumstances, petitioner
18 is not entitled to issuance of permit as requested.

19 Third Assignment of Error is denied.

20 The decision of Jackson County is affirmed.
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FOOTNOTES

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The Ordinance defines farm use as:

"The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops . . . or any other agricultural or horticultural use 'Farm use' includes the preparation and storage of the products raised on such land for human use and animal use and disposal by marketing or otherwise."

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9
"Agricultural use" is defined as follows:

" . . . the raising of field and tree crops including agriculture, horticulture, . . . , nurseries and greenhouses, and the necessary uses for storing produce that is incidental to that of normal agricultural activities, When located outside of a commercial or industrial zone, a plant nursery or greenhouse involving wholesale or commercial sales in an agricultural use only if the products offered for sale are produced by the farm use of the property as defined by this ordinance and ORS 215.203." Jackson County Land Development Ordinance, Section 00.040.

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The Jackson County Land Development Ordinance delegates to the planning director authority to interpret the Ordinance. Jackson County Land Development Ordinance, Section 290.010. On April 18, 1986, policy 45 was issued, addressing "plant nurseries." The policy states that importation of live plants on a seasonal basis, is incidental and accessory to a nursery use function. The policy did not include fertilizers, seed, garden implements, molted bark, mechanized equipment or other non-plant materials as part of the allowance of an agricultural use. Petitioner claims that, under this policy, "all activities presently occurring at Valley View Nursery are outright permitted uses expressly authorized by the county." Petition for Review at 14. Emphasis in original.

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In this case, petitioner argues that the county's decision was "based entirely on political rather than legal considerations." Petition for Review at 8.

Whether or not the decision was political is of little

1 consequence if the decision has an adequate basis in county
2 land use regulations and is supported by substantial evidence.
3 LUBA finds both qualifications met with regard to the traffic
4 issue.

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5 The capacity of Valley View Road is 6,000 vehicles per
6 day. Use of the road does not exceed this capacity, nor would
7 the capacity be exceeded were the permit to issue. The
8 county's "minimal" impact standard is not based on road
9 capacity. That is, the county is not precluded from finding
10 traffic impacts to be more than "minimal" by the road capacity
11 standard.

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13 In Lemmon v. Clemens, *Supra*, the court held a county may
14 not rely on acts in violation of land use laws as justification
15 for a legal exception to the land use regulations.

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18 In part, petitioner's argument is based on its earlier
19 complaint that the record includes no credible evidence showing
20 more traffic would result from the sale of accessory items.

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23 The county's finding identifies, among other things, two
24 parking lots. The record shows the parking lots will be an oil
25 mat surface with room for 23 customers. See Record Brief 34,
26 127, 142 and 148.