

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county hearings officer decision
4 denying his request to partition two existing tax lots into
5 three parcels.

6 **MOTION TO INTERVENE**

7 Viola-Fischer's Mill Community Planning Organization
8 moves to intervene on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 The subject 22.7 acre property is zoned Rural
12 Residential Farm Forest District (RRFF-5), and most of the
13 property was logged in 1989. The RRFF-5 zoning district
14 permits subdivision for residential purposes and requires a
15 5 acre minimum lot size. Petitioner originally requested a
16 minor partition under Clackamas County Zoning and
17 Development Ordinance (ZDO) 1106. Petitioner later
18 requested approval under the ZDO provisions governing major
19 partitions. ZDO 1105. A dispute arose concerning the
20 present roadway, which petitioner proposes to use to satisfy
21 ZDO requirements for access to the proposed parcels.
22 Opponents of the proposal argued, among other things, that
23 the roadways impact wetlands and a stream corridor. After
24 petitioner was given an opportunity to provide additional
25 information concerning the impact of the roadway on
26 wetlands, the hearings officer rendered the challenged

1 decision denying the requested partition. The hearings
2 officer's decision rests on findings that a number of
3 informational and substantive ZDO requirements are violated
4 by the requested partition.

5 **SECOND ASSIGNMENT OF ERROR**

6 Under his second assignment of error, petitioner
7 contends the county failed to give the required notice of
8 applicable approval criteria required by ORS 197.763(3)(b).
9 There are discrepancies in the notices of the three hearings
10 conducted in this matter by the hearings officer. The
11 discrepancies include a mistaken reference to ZDO 1106 in
12 the notice which preceded the third hearing. ZDO 1106
13 applies to minor partitions. The notice preceding the
14 second hearing correctly identified ZDO 1105, which governs
15 major partitions, as an applicable approval standard.¹ In
16 addition, while the notice of the first hearing correctly
17 listed ZDO 309, which sets out the requirements of the RRF-
18 5 zone, the notice of the final hearing erroneously listed
19 ZDO 209.²

20 As explained above, the notice given prior to the first

¹As noted earlier, petitioner initially requested approval of the proposed partition as a minor partition. The application was later changed to request approval of a major partition. We agree with respondent that the mistaken reference to the minor partition standards does not appear to have caused any confusion about which standards applied to the request.

²There is no section 209 in the ZDO. Respondent explains the reference to ZDO 209 was a typographic error, and the intended reference was to ZDO 309.

1 hearing stated that ZDO 309 applies. ZDO 309.08(A) provides
2 that the development standards of "Section 1000" apply. ZDO
3 Section 1000 includes Sections 1001 through 1019.
4 Petitioner contends the county's failure to specifically
5 list ZDO 1002 (Protection of Natural Features) or ZDO 1011
6 (Open Space and Parks) as applicable criteria in its notices
7 violates the requirement of ORS 197.763(3)(b) that
8 applicable criteria be identified in the notices of public
9 hearing for quasi-judicial land use proceedings.

10 We reject petitioner's argument for two reasons.
11 First, as noted above, the county did give notice that ZDO
12 309 applies, and ZDO 309.08(A) makes it sufficiently clear
13 that the development standards of ZDO Section 1000,
14 including those of ZDO 1002 and 1011, apply. Even if the
15 county's failures to repeat notice of the applicability of
16 ZDO 309 in its notices of hearing for the second and third
17 hearings constituted error, the error would be a procedural
18 error at most. Second, it is clear from the record that all
19 parties were well aware that the county considered the
20 development standards of ZDO Section 1000 to be applicable.
21 Petitioner's substantial rights, therefore, were not
22 prejudiced by the alleged errors in the notices of hearing,
23 and they provide no basis for reversal or remand. ORS
24 197.835(7)(a)(B); Forest Park Estate v. Multnomah County, 20
25 Or LUBA 319, 331 (1990).

26 The second assignment of error is denied.

1 **REMAINING ASSIGNMENTS OF ERROR**

2 Petitioner's ten remaining assignments of error include
3 a variety of challenges to the hearings officer's decision.
4 Because the challenged decision is a decision denying the
5 requested partition, petitioner must successfully challenge
6 each basis for denial. As we have explained on numerous
7 occasions, this burden is a significant one. See e.g. McCoy
8 v. Marion County, 16 Or LUBA 284, 286 (1987) (and cases
9 cited therein). The burden in challenging a decision
10 denying requested land use approval is particularly heavy
11 where petitioners allege that findings of noncompliance with
12 an applicable criterion are not supported by substantial
13 evidence. In making such an evidentiary challenge, the
14 petitioner must demonstrate that a reasonable decision maker
15 could only have believed the evidence supporting a finding
16 of compliance. See e.g. Adams v. Jackson County, 20 Or LUBA
17 398, 403 (1991)(and cases cited therein). For the reasons
18 explained below, we conclude the hearings officer's decision
19 that certain ZDO approval standards are violated by the
20 existing roadway is supported by substantial evidence in the
21 record.

22 We briefly describe below the three phases in which the
23 roadway was constructed and discuss one of petitioner's
24 underlying legal theories, before addressing two of the
25 standards the hearings officer found the existing roadway
26 violates.

1 **A. Construction and Improvement of the Roadway**

2 The disputed roadway is located entirely on the subject
3 property. A portion of the existing roadway apparently has
4 been in existence for many years and historically has
5 provided access to the property from Matoon Road, a county
6 road adjoining the western portion of the property. The
7 disputed roadway proceeds in an easterly direction through
8 the property. At a point several hundred feet east of
9 Matoon Road, the roadway adjoins a large wetland area to the
10 north of the roadway and a smaller wetland area to the south
11 of the roadway. The roadway forms a barrier between these
12 two wetlands.³ During the 1989 logging operations, the
13 disputed roadway was extended further east through the
14 subject property, and at a point slightly east of the middle
15 of the property, the roadway crosses an intermittent stream
16 and associated wetlands. The roadway stream crossing is
17 constructed on fill, creating a small pond on the upstream
18 side of the stream crossing.

19 As relevant to our resolution of this appeal, the
20 disputed roadway was constructed in three phases. During
21 the first phase, prior to the 1989 timber harvest, a portion
22 of the roadway was initially constructed. During the second
23 phase, which includes the timber harvest and the time up
24 until petitioner purchased the property in 1990, the road

³Petitioner's expert hydrologist speculated that the original construction of the roadway may have separated the two wetlands.

1 system was improved and expanded in conducting the timber
2 harvest.

3 Although there is some room for confusion on the point,
4 we do not understand the county's decision to be based on
5 any road construction that occurred during these first two
6 phases. However, we do not necessarily agree with
7 petitioner's suggestion that the county must allow any
8 roadways constructed during these first two phases to be
9 used to provide access to the proposed parcels, simply
10 because such roadways may have been constructed when no
11 county regulations applied, or when governed exclusively by
12 provisions of the Forest Practices Act (FPA). In
13 particular, with regard to the roadway extensions and
14 improvements that were made in conjunction with the timber
15 harvest, we know of no basis upon which the county could be
16 required to allow use of such roadways to provide the access
17 required for newly partitioned parcels, if those roadways do
18 not also comply with the standards governing roadways
19 providing access to newly created residential parcels.

20 The third phase of roadway construction and improvement
21 began in 1990, when petitioner purchased the property.⁴ We

⁴At several points in the petition for review, petitioner contends this phase of roadway maintenance and improvement was also accomplished under the FPA. Respondent and intervenor-respondent dispute that position. We conclude it does not matter because, as indicated above, whether or not the final phase of roadway improvements were at the time exclusively governed by FPA regulations, petitioner now proposes to utilize those roads to provide the required access for the proposed residential parcels. The county may require that those roadways satisfy ZDO requirements for such

1 understand the county's decision to be based, in part, on
2 findings that certain roadway maintenance and improvements
3 that occurred during this period violate code standards
4 designed to protect stream corridors and wetlands.

5 **B. Roadway Impacts on Stream Corridors and Wetlands**

6 The ZDO contains several sections limiting the
7 permissible impacts of development on wetlands and streams.⁵
8 The hearings officer found these requirements are violated
9 by the roadway included within the proposal.

10 **1. ZDO 1002.05(A) (Stream Corridors)**

11 The hearings officer adopted the following findings
12 explaining that the proposed application violates ZDO
13 1002.05(A):

14 "[ZDO] 1002.05(A) provides that all development
15 shall be planned, designed, constructed and
16 maintained so that stream corridors are preserved
17 to the maximum extent feasible, and further
18 requires that buffers of filter strips of natural
19 vegetation are retained along all stream banks.
20 The subject property has been partially developed.
21 This property was logged a few years ago, and
22 logging roads were constructed on the property in
23 association with the logging operation. Since the
24 purchase of this property by the applicant, he has
25 graded the subject property to enlarge and improve
26 the roads. These grading activities have resulted

roadways, regardless of whether the existing roadways were constructed in
accordance with FPA requirements.

⁵The hearings officer concluded the existing roadways constitute
"development," and petitioner does not dispute the point, except to contend
that the roadways are existing development. As we have already explained,
the county may require that existing roadways comply, or be modified to
comply, with the same requirements that would have to be satisfied to
approve a partition proposing new roadways.

1 in the damming of a stream on the property. the
2 result is the creation of a pond, with an outflow
3 provided under the lower road. This development
4 has failed to preserve the stream corridor and any
5 buffer of natural vegetation, as required by [ZDO]
6 1002.05(A)." Record 3.

7 There is no dispute that the roadway crosses a stream
8 and wetlands near the middle portion of the property.
9 Furthermore, there does not appear to be any serious dispute
10 that during the third phase of roadway improvements,
11 petitioner placed fill within wetlands and the stream
12 corridor where the roadway crosses the stream.⁶

13 We do not understand the hearings officer to have taken
14 a position concerning whether the stream crossing might be
15 modified to comply with ZDO 1002.05(A). Rather, the
16 hearings officer simply found that, as constructed, the
17 roadway violates that section of the ZDO.⁷ Those findings
18 are supported by substantial evidence in the record.

⁶The record includes documents signed by county staff and a representative of the Oregon Division of State Lands (DSL) reaching that conclusion. The hydrologic report prepared on petitioner's behalf also appears to concede that fill was placed in wetlands, the stream and stream corridor in conjunction with the third phase improvements to the stream crossing. To the extent it does not concede the point, the report clearly does not take the position that such fill was not placed in the stream corridor. Rather, the report only takes the position that less than 50 cubic yards of such fill was placed in the stream corridor.

⁷Petitioner points out that ZDO 1002.05(A) only requires that stream corridors be protected "to the maximum extent feasible." However, we understand the hearing officer to have found that this was not done in the area where the roadway crosses the stream. While a more detailed explanation of why the hearings officer reached that conclusion might be helpful to petitioner in determining how he might modify the crossing to comply with ZDO 1002.05(A), petitioner does not allege failure to provide such an explanation as error.

1 Petitioner explains that the roadway was purposely
2 constructed to raise the level of the roadway and increase
3 the area of the adjoining pond to provide additional
4 accessible stored water for fire fighting, to satisfy fire
5 district requirements. To the extent petitioner argues the
6 fire district requirements provide a basis for requiring
7 that the county approve use of a roadway that violates
8 county requirements for protecting stream corridors, we do
9 not agree.

10 **2. ZDO 1002.06(B)(3) (Wetlands)**

11 The hearings officer adopted the following findings in
12 concluding the proposal violates ZDO 1002.06(B)(3):

13 "[ZDO] 1002.06(B)(3) * * * provides that all
14 development within 100 feet of any wetland shall
15 eliminate the need for filling * * * in the
16 wetland area. (The possible exception to this
17 requirement is not applicable to this type of
18 development). The subject property contains a
19 significant wetland area. The proposed road
20 system in the area of the wetland has been graded
21 and filled within the wetland area. There is no
22 showing that the wetland area can be restored and
23 a private road system constructed outside of the
24 protected area to provide access to the proposed
25 parcels." Record 3.

26 As noted above, there does not appear to be any doubt
27 that fill was placed in wetlands in the area of the stream
28 crossing, in violation of ZDO 1002.06(B)(3). There is also
29 evidence that fill may have been placed in wetlands in
30 conjunction with roadway improvements where the roadway
31 passes between the two wetland areas in the western portion

1 of the property.⁸ In response to this evidence, petitioner
2 had a hydrologic report prepared which concluded that any
3 fill associated with third phase roadway improvements in
4 this area was not placed in the adjoining wetlands. In the
5 above findings, the hearings officer apparently did not
6 agree with that conclusion in the hydrologic report.

7 We agree with petitioner that the hearings officer
8 should have explained why he rejected the report's
9 conclusion and apparently relied instead on the earlier
10 written testimony about fill in this area. The earlier
11 written testimony was not based on a detailed study of the
12 subject property.⁹ The hydrologic report appears to be well
13 documented, and its reasons for concluding that no fill was
14 placed in the wetlands on the western portion of the
15 property are explained in some detail.

16 However, the lack of explanation in the findings
17 provides no basis for reversal or remand in this case, even
18 if we were to conclude that the hydrologic report is
19 sufficient as a matter of law to establish that the roadway
20 improvements in this area of the property were made without

⁸There are written statements by county staff and a representative of DSL to this effect. Record 58-59, 98, 104-06, 108, 110.

⁹This is not to say the earlier written testimony is entitled to no weight. Both the county staff and DSL representative visited the site and based their conclusions on their observations. However, their conclusions about whether fill actually was placed in the wetlands in this area during the third phase improvements are somewhat equivocal.

1 placing fill in the two adjoining wetlands.¹⁰ We have
2 already determined that the hearings officer's findings that
3 the stream crossing near the middle of the property violates
4 both ZDO 1002.05(A) and 1002.06(B)(3) are both adequate and
5 supported by substantial evidence in the record. Those
6 findings are therefore sufficient to support the decision to
7 deny the requested partition, regardless of the adequacy of
8 the findings, and their evidentiary support, concerning any
9 violations associated with the third phase roadway
10 improvements in the western portion of the property.¹¹

11 **C. Failure to Impose Conditions**

12 In his tenth assignment of error, petitioner alleges
13 the hearings officer should have imposed whatever conditions
14 he believed were necessary to achieve compliance applicable
15 standards. With regard to third phase improvements to the
16 disputed roadway, petitioner argues the hearings officer's
17 failure to simply impose conditions to achieve the standards
18 is particularly inappropriate in view of petitioner's offer
19 during the local proceedings to remove gravel or make any
20 changes necessary to assure that the roadway complies with
21 applicable standards.

¹⁰We need not and therefore do not decide whether such is the case.

¹¹Although we only address the limitations imposed on development affecting wetlands imposed by ZDO 1002.06(B)(3), the hearings officer also determined the proposal violates ZDO 1011.03 (requiring preservation of wetlands as high priority open space) for essentially the same reasons he found the proposal violates ZDO 1002.06(B)(3).

1 It is not clear to us that the hearings officer could
2 have developed conditions of approval sufficient to allow
3 him to find that all of the relevant approval standards are
4 met. However, even if he could have done so, we are aware
5 of no requirement that he do so. While local government
6 decision makers frequently retain the authority to impose
7 conditions necessary to assure compliance with applicable
8 approval criteria, Eckis v. Linn County, 19 Or LUBA 15, 35
9 (1990), we have held that they are not obligated to do so.
10 Simonson v. Marion County, ___ Or LUBA ___ (LUBA No. 90-121,
11 June 21, 1991), slip op 16-17. Once the hearings officer
12 explained why the partition as proposed fails to satisfy
13 relevant approval standards, he could appropriately deny
14 the request and was under no obligation to develop
15 conditions to limit or modify the proposal to achieve
16 compliance with those standards. Id.

17 **D. Conclusion**

18 Even if the remaining arguments advanced by petitioner
19 under his assignments of error challenging the other reasons
20 given by the hearings officer for denying the request have
21 merit, the county's decision includes an adequate
22 explanation for why at least two approval requirements are
23 not satisfied. Those findings are sufficient to require
24 that we affirm the county's decision.

25 The county's decision is affirmed.

26