

LAND USE  
BOARD OF APPEALS

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

APR 21 11 40 AM '87

CAROL JARVIS, ROBERT L. PALMER )  
and DONALD W. RIECK, )  
Petitioners, )  
vs. )  
WALLOWA COUNTY, )  
Respondent. )

LUBA No. 87-005  
FINAL OPINION  
AND ORDER

Appeal from Wallowa County.

David S. Jackman, Enterprise, filed a petition for review and argued on behalf of petitioners.

Jonel K. Ricker, Enterprise, filed a response brief and argued on behalf of Respondent Daggett.

No appearance by Wallowa County.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

REVERSED AND REMANDED 04/21/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a decision of the Wasco County Court  
4 granting a minor partition and allowing an exception to certain  
5 county subdivision ordinance standards.

6 FACTS

7 The minor partition creates one 5 acre and one 44 acre  
8 parcel. The property is zoned R-1, for residential use, and is  
9 about one mile north of the City of Joseph. Access to the  
10 property is by a roadway which serves some smaller parcels  
11 created before the current comprehensive plan and zoning  
12 ordinance were adopted in 1977. Portions of the roadway do not  
13 meet present county standards.

14 The access road has a 38 foot right-of-way width for the  
15 first 915 feet from Highway 82 and a 50 foot right-of-way width  
16 for the remaining 1450 feet. Current right-of-way standards  
17 call for a width of 60 feet. At present, the traveled portion  
18 of the roadway varies from less than 17 feet in width to 20  
19 feet. The "surfacing" standard in the Wallowa County  
20 Subdivision Ordinance calls for a surfaced width of 24 feet.

21 ASSIGNMENT OF ERROR NO. 1

22 "Respondent's decision upholding the Planning  
23 Commission's approval of an exception to the 'improved  
24 public access' standards for a minor partition are not  
supported by substantial evidence in the whole record  
as required by ORS 197.835(8)(a)(C)."

25 An "exception" to county roadway standards requires  
26 findings on the following criteria:

- 1 "A. That there are special circumstances or  
2 conditions affecting the property that do not  
3 normally apply to other property and that such  
4 circumstances or conditions make it impossible or  
5 impractical to comply with the ordinance.
- 6 "B. That the exception is necessary for the proper  
7 design and/or function of the subdivision or  
8 partition.
- 9 "C. That the granting of the exception will not be  
10 detrimental to the public welfare or injurious to  
11 other property in the area in which the property  
12 is situated.
- 13 "D. That the granting of the exception is in  
14 accordance with the purposes and objectives  
15 prescribed in Chapter 1 of this ordinance.
- 16 "E. That the exception is necessary for the  
17 preservation and enjoyment of a substantial  
18 property right because of an extraordinary  
19 hardship which would result from strict  
20 compliance with the regulations of this  
21 ordinance."

22 The county found that a special circumstance affected the  
23 property in that

- 24 "8. Private landowners along the access road have  
25 turned down an offer by the applicant to purchase  
26 additional right of way at a price which is  
higher than the fair market value.
- "9. The applicant's attempts to form a road  
improvement district to widen the right of way  
and improve the road (including its alignment at  
intersections) have been successfully resisted by  
other landowners along the access road.
- "10. It is impossible, or at least impractical, for  
the applicant to obtain a 60 foot right of way  
and to provide proper alignment of roads at the  
intersection with Highway 82 due to the special  
circumstances described above. (Rec. 12, 13)."

Petitioners argue these findings are not sufficient to show  
compliance with Section 604(A), supra. The high price for

1 additional right-of-way, the failure to form an improvement  
2 district and the lack of success in obtaining additional  
3 right-of-way are not findings of impossibility or  
4 impracticality as required in the ordinance, according to  
5 petitioners. Petitioners conclude the county erred in finding  
6 an exception to the 60 foot right-of-way standard was  
7 justified.

8 The language of this ordinance is quite similar to that  
9 found in variance provisions of ordinances of other  
10 jurisdictions. The words "special conditions or circumstances  
11 affecting the property" in variance ordinances have been  
12 interpreted to refer to physical conditions inherent in the  
13 property itself and not to the mere inconvenience or expense  
14 that may be caused the landowner. See 3 R. Anderson, American  
15 Law of Zoning, Sec. 20.12 (3d. ed. 1986).

16 Nothing about the property in the county's order shows a  
17 condition in the land which makes compliance with the road  
18 standards impossible or impractical. The order simply recites  
19 an expense to the landowner in answer to this standard. The  
20 expense is perhaps inconvenient; it is not an impossible or  
21 impractical circumstance, however. We therefore agree with  
22 petitioners that the county has not shown that there are  
23 "special circumstances or conditions affecting the property,  
24 that do not normally apply to other properties."

25 Further, we do not understand the word "impractical" to  
26 permit variation of county road standards simply because the

1 landowner finds it less expensive or more convenient to obtain  
2 an exception.<sup>1</sup> As with impossibility, we understand the term  
3 to refer to conditions and circumstances inherent in the land  
4 itself making compliance with the ordinance an impossible or  
5 truly impractical burden. See R. Anderson, supra, Sec.  
6 20.08-20.10; Lovell v. Independence Planning Commission, 37 Or  
7 App 3, 586 P2d 99 (1978); Moore v. Clackamas County Comm., 35  
8 Or App 39, 580 P2d 583 (1978); Faye Wright Neighborhood  
9 Planning Council v. City of Salem, 3 Or LUBA 17 (1981).

10 Lastly, we note there is no discussion in the findings  
11 about other property. The ordinance at Section 604(A) calls  
12 for comparison of conditions affecting the subject property and  
13 other property. Without such comparison, the applicant is  
14 unable to show that the special circumstances or conditions  
15 affecting his property do not apply normally to "other  
16 property."

17 Petitioners next allege that Section 604 (B) and (E) are  
18 not satisfied by the county's order. Section 604 (B) requires  
19 a finding that the exception be necessary for proper design or  
20 function of the partition, and Section 604(E) requires a  
21 showing that the exception be necessary for preservation of  
22 substantial property rights. See page 3, supra. The county's  
23 finding simply states that the applicant purchased the property  
24 knowing it was zoned for R-1 use and assumed he could build  
25 residences. Record 4.

26 The standard contained in Section 604(B) authorizing an

1 exception if it is "necessary for the proper design and/or  
2 function of the subdivision or partition" is unclear. The  
3 county's findings do not advise what the county believes to be  
4 the proper interpretation of this provision. Presumably, the  
5 provision allows exceptions to particular subdivision and  
6 partitioning standards as may be necessary to permit the  
7 developer to meet other design standards or fashion a  
8 development which is more efficient in some respect than  
9 possible without the exception. Nothing in the ordinance  
10 suggests this standard is intended to permit a variance simply  
11 because the owner expected that he could build residences on  
12 the property. The owner's expectation at the time of the  
13 purchase has little or nothing to do with "the proper design  
14 and/or function of the subdivision or partition."

15 With respect to Section 604(E), we find the county has not  
16 articulated that an "extraordinary hardship" would result "from  
17 strict compliance with the regulations of this ordinance."  
18 Typically a claim of "extraordinary hardship" requires a  
19 showing of inability to make profitable use of land without the  
20 benefit of the variance, or in this case, the exception. 3 R.  
21 Anderson, supra at Section 20.17. The only hardship identified  
22 is the possibility the applicant having to leave the land "in  
23 its present use as pasture land." This use may be less  
24 profitable, but it is not a "hardship" under the ordinance.  
25 Lovell, supra.

26 We therefore agree with petitioners that the finding is not

1 responsive to the criteria.

2 Petitioners next claim that Ordinance Section 604(C)  
3 remains unmet. The ordinance requires the exception not be  
4 detrimental to public welfare or injurious to property in the  
5 area. The county's findings state simply that

6 "11. The current right of way is adequate to serve  
7 existing residences as well as the three  
8 additional parcels proposed in this application.  
9 The additional traffic caused by three additional  
10 parcels will be minimal, will not pose a safety  
11 hazard and will not be detrimental to the public  
12 welfare or injurious to other property in the  
13 area even if the right of way is not widened and  
14 alignment at the intersection is not provided."  
15 Record 4.

16 Petitioners advise there is testimony in the record that as  
17 many as 11 additional parcels may be served by this access if  
18 the exception is granted. Record 120. Petitioners point to  
19 testimony that there are safety concerns if roadway alignment  
20 and other problems are not corrected. Record 50, 61, 63, 64,  
21 67, and 111. Petitioners conclude the finding is not supported  
22 by substantial evidence and is inadequate to show compliance  
23 with the standard.

24 The evidence to which we are cited does discuss hazards.  
25 We are cited to no evidence supporting the county's conclusion  
26 of no hazard.<sup>2</sup> Because the only cited evidence supports  
petitioners' contention, we must agree with petitioners that  
the county's finding of no safety hazard is not supported by  
substantial evidence. Home Builders Association v.  
Metropolitan Service District, 54 Or App 60, 633 P2d 1320

1 (1981).

2 Petitioners next claim that Section 604(D) is not satisfied  
3 because there is no showing that "the applicant has met the  
4 following requirements of the subdivision ordinance."

5 "Section 102 (C):

6 "To provide streets of adequate capacity for the  
7 anticipated traffic which would utilize them and to  
8 ensure that they are designed to promote a safe  
vehicular and pedestrian traffic circulation system.

9 "Section 106:

10 "Subdivisions and partitions shall conform to the  
11 policies of the Comprehensive Plan and elements  
12 thereof, as adopted by the County Court, with respect  
13 to the type and intensity of land use, population  
densities and distribution, locations and size of  
public areas, rights-of-way and improvements of public  
streets, and other similar matters set forth in said  
plan."

14 Section 102 is the "purpose" section of the Wallowa County  
15 Subdivision Ordinance. Section 102 provides that the ordinance  
16 is written to achieve a number of objectives, one of which is  
17 found in Section 102(C). We do not understand this purposes  
18 section to create approval standards. The specific approval  
19 standards included in the subdivision ordinance are designed to  
20 ensure compliance with the general purposes of the ordinance.  
21 Where the developer meets the streets standards included in the  
22 ordinance, the developer has satisfied the purposes statements  
23 found in Section 102.

24 Petitioners are correct that the findings do not address  
25 compliance with the comprehensive plan. However, petitioners  
26 do not cite us to any plan provision which might be applicable

1 to an individual partitioning or subdivision request. However,  
2 Section 106 of the subdivision ordinance does not require  
3 specific findings showing compliance with each element of the  
4 comprehensive plan. Our review of the plan does not reveal any  
5 specific standards applicable to individual developments. It  
6 therefore appears that Section 106 refers to general land use  
7 planning issues which are addressed in the specific standards  
8 of the subdivision ordinance and the zoning ordinance. The  
9 plan does not add a separate set of standards. We therefore  
10 reject petitioners' claim on this issue.

11 We sustain the First Assignment of Error, in part.

12 ASSIGNMENT OF ERROR NO. 2

13 "Respondent failed to require an exception to Sec. 304  
14 (C) (1), regarding the proper alignment of streets, or  
15 to make adequate findings supporting such an  
exception."

16 Petitioners here argue that the record reveals, and the  
17 findings acknowledge, that the roadway serving the partitioned  
18 land does not properly align with access to Highway 82.

19 Section 304(C)(1) of the subdivision code provides that

20 "Streets located on opposite sides of an intersection  
21 street shall have their centerlines directly opposite  
22 each other where possible, otherwise, the centerline  
shall be separated by not less than one hundred (100)  
feet."

23 It is clear that the street is not in alignment, and that  
24 no exception or variance to the misalignment was attempted.  
25 While respondent argues that the alignment requirement in the  
26 subdivision ordinance does not apply to preexisting streets, we

1 do not believe the county may escape a street alignment  
2 requirement imposed by the subdivision ordinance. There is  
3 nothing in the code to suggest that each new partition may be  
4 serviced by a substandard or improperly aligned street or  
5 road. The fact that this partition is not served adequately  
6 means the partition does not conform to the code. In order for  
7 the partition to be approved, the appropriate road standards  
8 must be satisfied. The options available are: 1) to improve  
9 the roadway as required for the partitioning, 2) take a valid  
10 exception to the road standard or 3) deny the partitioning.

11 This error requires us to reverse this decision. If it is  
12 to approve the partition, the county must ensure the road  
13 standards are met.

14 ASSIGNMENT OF ERROR NO. 3

15 "Respondent violated the WCSO Sec. 307 (A) (2) in not  
16 requiring an exception to be granted pursuant to  
17 Chapter 6 of the WCSO, to the lot depth to width ratio  
18 requirement before approving the minor partition."

19 Section 307(A)(2) of the subdivision ordinance requires  
20 there be a 2 to 1 width to depth ratio in any newly created  
21 lot. The 2 to 1 depth ratio effectively prohibits lots which  
22 have a long thin extension from the main body of the lot.  
23 These so-called "flag lots" may provide the owner of the lot  
24 with access to a public roadway, but are nonetheless prohibited  
25 by the 2 to 1 depth ratio requirements.

26 Respondent does not challenge the fact that the lot is a  
flag lot. Respondent argues the flag configuration is mandated

1 in order to conform with street frontage requirements found in  
2 Section 307(A)(3).

3 We disagree. Street frontage requirements do not permit  
4 the county to violate a second and independent requirement in  
5 the ordinance. The county must comply with each ordinance  
6 provision or obtain a valid exception. An exception was not  
7 taken in this case.<sup>3</sup>

8 We sustain this assignment of error.

9 ASSIGNMENT OF ERROR NO. 4

10 "Respondent failed to address the fourth ground for  
11 appeal noted in petitioners' original appeal to the  
12 County Court (Rec. 34), that there were no findings of  
13 fact adopted pursuant to Sec. 106 of the WCSO finding  
14 that the proposed minor partition conformed to the  
15 policies of the Comprehensive Plan."

16 We discussed petitioners' charge about Section 106 under  
17 Assignment of Error No. 1. Petitioners make an additional  
18 charge here that the plan permits approval of rural  
19 subdivisions only after all needed services are provided or can  
20 be made available. See Wallowa County Comprehensive Plan,  
21 Public Facility and Service Guidelines No. 3, page 82. Finding  
22 4, Record 3, states simply that "electrical power is available  
23 to the parcels but no community sewer or water is available."

24 Chapter 3 of the subdivision ordinance includes  
25 requirements about sewer and water. Section 302(B) requires  
26 the developer to provide a statement of sewage suitability for  
every lot or parcel. Section 303(B) requires the developer to  
prove that adequate water is available to support the proposed

1 use, in this case a residential use. As noted, the findings do  
2 not show that sewer and water is available or will be  
3 provided. In this regard, the county's order violates the  
4 subdivision code.

5 We do not understand the Wallowa County Comprehensive Plan  
6 to supply an additional set of requirements. The comprehensive  
7 plan does require that subdivisions be approved only after  
8 needed services are provided or can be made available, but this  
9 requirement is included in a plan section whose goal is

10 "To plan and develop timely, orderly and efficient  
11 arrangement of public facilities and services to serve  
12 as the framework for urban and rural development."

13 Achieving this goal is possible through the county's zoning  
14 and subdivision requirements. Because the zoning and  
15 subdivision requirements exist and include controls on public  
16 facilities and services, we do not believe that a developer  
17 need show compliance with this plan element in addition to  
18 showing compliance with specific development standards.

19 We therefore deny this assignment of error. Since this  
20 case is to be returned to Wallowa County, the county may  
21 consider the public services requirements under the subdivision  
22 code.

#### 22 ASSIGNMENT OF ERROR NO. 5

23 "The Respondent erred in reducing the required road  
24 surface width, which was 22' in the Planning  
25 Commission decision document, to 20' in the County  
26 Court's December 29, 1986 decision document without  
adopting any specific findings of fact justifying this  
change, or without even giving notice to the  
interested parties that such a change was under

1 consideration."

2 Petitioners argue that the county commissioners changed a  
3 condition placed in the order by the planning commission  
4 without notice or consideration. We understand petitioners to  
5 argue that findings are required for this change.

6 We do not agree. A modification of a condition or approval  
7 by the county governing body from a planning commission  
8 decision does not require notice or specific findings regarding  
9 the change. The Wallowa County Court has the power, under its  
10 ordinance, to alter a planning commission's decision. Whether  
11 the road width does indeed comply with the ordinance standards,  
12 however, is a separate issue which we do not reach under this  
13 assignment of error.

14 We deny this assignment of error.

15 ASSIGNMENT OF ERROR NO. 6

16 "Respondent did not address in its findings the  
17 requirement in Section 304(c)(7) of the WCSO that  
18 'whenever existing streets...are of inadequate  
19 width...additional right of way...shall be  
20 provided...'"

21 Petitioners argue Section 304(c)(7) is violated. The  
22 section states:

23 "Existing Streets: Whenever existing streets adjacent  
24 to or within a subdivision or partition are of  
25 inadequate width, additional right-of-way and  
26 improvements shall be provided at the time of  
subdivision or partitioning in accordance with the  
standards prescribed in this ordinance."

27 Petitioners argue that granting an exception in the  
28 circumstances in this case, where the roadway is less than

1 required width, "flies in the face of the clear and specific  
2 language of this provision...." Petition for Review at 16.

3 While not clear from the record, it appears a portion of  
4 the roadway is adjacent to the applicant's property. See  
5 Record 144. The provision clearly requires that inadequate  
6 right-of-way width requires the developer to provide additional  
7 right-of-way and improvements before approval of a subdivision  
8 or partition request. In this case, the county's order does  
9 not show compliance with this standard.

10 The decision of the Wallowa County Court is reversed and  
11 remanded to the county for further consideration not  
12 inconsistent with this opinion.

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FOOTNOTES

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Conceivably, the county might disagree with our interpretation of this ordinance. We are bound to accept any interpretation which is "reasonable." Alluis v. Marion County, 64 Or App 478, 678 P2d 1242 (1983).

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2

Respondent's brief states that Mr. Daggett and the county roadmaster testified as to the safety of the road, we are not cited to where the testimony appears or told of its substance. We will not search the record to find evidentiary support for the county's order. 1000 Friends of Oregon v. Washington County, 13 Or LUBA 65 (1985).

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3

Respondent argues that there are other lots showing this same flag configuration. The fact that other lots may be in violation of county code does not permit a violation here.

Respondent also argues each lot does not vary more than 100 percent comparing the depth to the width. Respondent is in error. Record 144 shows the configuration of the flag lot. The main body of the lot consists of a five acre rectangle and a long 60 foot wide extension leading down to the road. While the main body of the lot may be within ordinance standards, the whole lot, including the flag, violates the standard.