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

J. C. REEVES CORPORATION and)
JERRY C. REEVES,)
)
Petitioners,)
)
and)
)
COMMON GROUND: THE URBAN LAND)
COUNCIL OF OREGON,)
)
Intervenor-Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent.)

LUBA No. 91-072
FINAL OPINION
AND ORDER
)

Appeal from Clackamas County.

Steven L. Pfeiffer, Portland, filed a petition for review and argued on behalf of petitioners. With him on the brief was Stoel, Rives, Boley, Jones & Grey.

Jon A. Chandler, Lake Oswego, filed a petition for review on behalf of intervenor-petitioner. Dorothy Ann Cofield, Lake Oswego, argued on behalf of intervenor-petitioner.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 11/20/91

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a county hearings officer's
4 decision denying their request to modify conditions
5 previously imposed by the county on the approval of a
6 preliminary subdivision plat.

7 **MOTION TO INTERVENE**

8 Common Ground: The Urban Land Council of Oregon moves
9 to intervene in this appeal proceeding on the side of
10 petitioners. There is no opposition to the motion, and it
11 is allowed.

12 **FACTS**

13 On April 27, 1990, the county hearings officer approved
14 the preliminary plat for the subject 23-acre, 79-lot
15 residential subdivision. The proposed subdivision is
16 generally triangular in shape, and is bordered by Comanche
17 Bluff, a previously developed subdivision, along its
18 southwestern edge. S.E. 132nd Avenue, a collector, extends
19 south from S.E. Sunnyside Road, an arterial. At the time
20 preliminary plat approval was granted, S.E. 132nd Avenue
21 ended at the northern boundary of the proposed subdivision.
22 Condition 18 of the preliminary plat approval requires
23 petitioner J.C. Reeves Corporation (applicant) to construct
24 to collector standards a north-south street extending S.E.
25 132nd Avenue from its current terminus southward to S.E.

1 Hubbard Road, an arterial.¹

2 As originally proposed, the subject subdivision did not
3 abut S.E. Hubbard Road. The subject property was separated
4 from S.E. Hubbard Road by the southeast corner of "Tract A"
5 of Comanche Bluff, a common open space area. To accomplish
6 construction of S.E. 132nd Avenue from the southern border
7 of the originally proposed subdivision to S.E. Hubbard Road
8 (hereafter "S.E. 132nd Avenue extension"), the applicant was
9 required to acquire the southeast corner of Tract A.² Such
10 acquisition would reduce the amount of open space in
11 Comanche Bluff below that required under the Clackamas
12 County Zoning and Development Ordinance (ZDO). Condition 43
13 of the preliminary plat approval requires the applicant to
14 bring Comanche Bluff into compliance with ZDO open space
15 standards by obtaining a variance, adding land within the
16 proposed subdivision to Tract A of Comanche Bluff, or any

¹Two local streets, S.E. 130th Drive and S.E. 131st Drive, extend north from S.E. Hubbard Road through Comanche Bluff, and end at the southwestern edge of the proposed subdivision. Under the approved preliminary plat, these streets would be extended into the subject subdivision, and would intersect S.E. 132nd Avenue from the west. Thus, even if S.E. 132nd Avenue were not extended to S.E. Hubbard Road, through traffic between S.E. Sunnyside Road and S.E. Hubbard Road would become possible, via S.E. 130th or 131st Drive and S.E. 132nd Avenue.

²The preliminary subdivision plat approved by the county includes, at the southeast corner of the proposed subdivision, an approximately 0.75 acre area that was originally the southeast corner of Tract A. Record 44. This area includes the approximately 200 foot long S.E. 132nd Avenue extension, extending from the southern boundary of the originally proposed subdivision to S.E. Hubbard Road. The subdivision, as originally proposed, included about 1200 feet of S.E. 132nd Avenue within its boundaries.

1 other acceptable means.

2 The hearings officer's April 27, 1990 decision
3 approving the preliminary plat was not appealed. Subsequent
4 to that decision, the applicant acquired the necessary
5 portion of Tract A, obtained a variance to the ZDO open
6 space standards for Comanche Bluff, and constructed the
7 infrastructure required for the proposed subdivision,
8 including the S.E. 132nd Avenue extension.

9 On February 19, 1991, the applicant filed with the
10 county a request for a modification of the conditions of
11 preliminary plat approval relating to the S.E. 132nd Avenue
12 extension.³ The applicant requested that the conditions be
13 modified to require county participation in financing the
14 S.E. 132nd Avenue extension, including both the cost of
15 acquiring the subject portion of Tract A and the cost of
16 constructing that segment of S.E. 132nd Avenue. After a
17 public hearing, the hearings officer issued a decision
18 denying the applicant's request. This appeal followed.

³The parties dispute whether the applicant's request also included a proposal that the approved preliminary plat be modified to delete the area that was formerly part of Tract A (and, therefore, eliminate direct access from the proposed subdivision to S.E. Hubbard Road as well). In the challenged decision, the hearings officer found that at the April 15, 1991 public hearing on the applicant's request, petitioner Jerry C. Reeves, the applicant's president and representative, clarified that the request was solely to modify the conditions of approval regarding financial participation by the county in construction of the S.E. 132nd Avenue extension, and not to modify the preliminary plat to delete the portion of Tract A where the S.E. 132nd Avenue extension is located. Record 2. We agree with the hearings officer's characterization of petitioner's testimony, and with his determination that the applicant's request was only to modify the conditions of preliminary plat approval. Record 22-24.

1 **FIRST ASSIGNMENT OF ERROR (PETITIONERS)**

2 "Respondent's refusal to modify the conditions of
3 its preliminary plat approval to delete the
4 requirement to build and dedicate an extension of
5 S.E. 132nd Avenue violated [ZDO] §§ 1007.03.F.3
6 and 1303.12.B and Comprehensive Plan Roadways
7 Policy 9.0 and is not supported by substantial
8 evidence."

9 **FIRST ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)**

10 "The Respondent's refusal to modify the conditions
11 of its preliminary plat approval to delete the
12 requirement to build and dedicate an extension of
13 S.E. 132nd Avenue violated [ZDO] Secs. 1007.03.F.3
14 and 1303.12.B and Comprehensive Plan Roadways
15 Policies 8.0 and 9.0."

16 Subdivisions are required to be consistent with the ZDO
17 and the Clackamas County Comprehensive Plan (plan).
18 ZDO 1105.02.A. Under the ZDO, the approval of a preliminary
19 subdivision plat is an "administrative action." ZDO
20 1301.01.B.2. Approval of an administrative action may be
21 granted subject to conditions which satisfy the following
22 standard:

23 "Such conditions shall be reasonably calculated to
24 fulfill public needs * * * emanating from the
25 proposed land uses as set forth in the application
26 in the following respects:

27 "1. Protection of the public from the potentially
28 deleterious effects of the proposed use; or

29 "2. Fulfillment of the need for public service
30 demands created by the proposed use."
31 ZDO 1303.12.B.

32 Additionally, subdivisions are subject to the
33 development standards of ZDO Section 1000. ZDO 1001.02.A.

1 ZDO 1007.03.F.3 provides:

2 "New developments and subdivisions which
3 substantially impact off-site roadways may be
4 required to participate financially in improving
5 the roadways sufficient to accommodate traffic
6 generated by the development. The extent of
7 participation shall be determined by the [county]
8 Department of Transportation and Development."
9 (Emphasis added.)

10 The above quoted ZDO provision implements plan Roadways
11 Policy 9.0, which provides:

12 "Assess off-site traffic impacts expected to be
13 caused by new developments and subdivisions. The
14 developer or subdivider may be required to
15 participate financially in the provision of off-
16 site improvements required to handle traffic
17 generated by the development." (Emphasis added.)

18 The conditions of preliminary plat approval require
19 construction of the S.E. 132nd Avenue extension prior to
20 final plat approval. However, the conditions do not
21 explicitly state who is responsible for paying for the S.E.
22 132nd Avenue extension, which issue is the subject of the
23 applicant's request for modification of the conditions.⁴

⁴The applicant's request for modification of conditions was filed under ZDO 1303.12.C, which provides that "[c]hanges or alterations of conditions shall be processed as a new administrative action." The challenged decision includes findings that the imposition of the original conditions complies with ZDO 1303.12.B, quoted supra. Nevertheless, we do not believe ZDO 1303.12.C allows an applicant to collaterally attack conditions of preliminary plat approval which were not timely appealed. However, in this case, the county does not argue that petitioners are making such a collateral attack. Rather, the county agrees with petitioners that the originally imposed conditions did not address the issue of who would pay for the S.E. 132nd Avenue extension and, therefore, the county treated the applicant's request as a proposal to modify the conditions of approval to require financial participation by the county. Further, we do not understand either petitioners or intervenor-petitioner to contend the

1 With regard to this issue, the challenged decision states,
2 as relevant:

3 "[ZDO 1007.03.F.3] is not directly applicable to
4 this situation. That subsection contemplates
5 improvements to existing roadways necessitated by
6 impacts from new subdivisions on those existing
7 roadways. That is not the case here.

8 * * * * *

9 "The applicant has pointed to no provision of the
10 ZDO or the Plan which provides that the County
11 should be required to participate in the financing
12 of road improvements such as are required by the
13 conditions of approval. * * * The record of this
14 proceeding establishes that the County has not
15 determined that it should participate in the
16 financing of the required improvements. The
17 applicant has failed to show that the County has
18 agreed to participate in the financing of these
19 improvements.

20 "The applicant argues that the general public, in
21 addition to the residents of [the proposed
22 subdivision, will] benefit from the extension of
23 S.E. 132nd [Avenue]. The applicant is undoubtedly
24 correct in this argument. However, that fact does
25 not require County financing of the improvements."
26 Record 3-4.

27 Petitioners and intervenor-petitioner (petitioners)
28 contend ZDO 1007.03.F.3 governs the extent to which a
29 developer can be required to pay for off-site roadway
30 improvements, including improvements to existing off-site
31 roads and the construction of new off-site roads.
32 Petitioners argue ZDO 1007.03.F.3 is more stringent than ZDO

requirement for construction of the S.E. 132nd Avenue extension in itself is impermissible, only the refusal of the county to bear any of the cost of this off-site improvement.

1 1303.12.B, the ZDO provision addressing conditions of
2 approval generally, in that ZDO 1007.03.F.3 requires a
3 finding that a proposed development will "substantially
4 impact off-site roadways," and limits financial
5 participation by the developer in off-site roadway
6 improvements to those which are "sufficient to accommodate
7 traffic generated by the development." Petitioners also
8 argue that both plan Roadways Policy 9.0 and ZDO 1007.03.F.3
9 require that a developer's financial participation in
10 constructing off-site roadway improvements be proportional
11 to the adverse impacts generated by the proposed
12 development. According to petitioners, full payment by the
13 developer for the provision of off-site roadway improvements
14 may be required only where the need for the off-site
15 improvements is fully attributable to the traffic generated
16 from within the proposed development itself.

17 Petitioners argue the county erroneously failed to
18 apply ZDO 1007.03.F.3 and plan Roadways Policy 9.0 to its
19 decision. Petitioners further argue the findings adopted by
20 the county, at most, establish that the traffic generated by
21 the proposed subdivision together with through traffic from
22 outside the subdivision are responsible for the need to
23 extend S.E. 132nd Avenue to S.E. Hubbard Road. According to
24 petitioners, this does not justify placing the entire
25 financial burden for constructing the S.E. 132nd Avenue
26 extension on the applicant. Petitioners also contend the

1 county's findings are not supported by substantial evidence
2 in the record.⁵

3 The county argues ZDO 1007.03.F.3 is not applicable
4 here "since by its own terms it applies only to the
5 improvement of existing off-site roadways." (Emphasis in
6 original.) Respondent's Brief 5. The county also argues
7 that even if ZDO 1007.03.F.3 did apply, its second sentence
8 provides the county with a great deal of flexibility in
9 determining the extent of an applicant's financial
10 participation in the construction of new off-site roadways.
11 The county contends that neither plan Roadways Policy 9.0
12 nor ZDO 1007.03.F.3 requires that the extent of financial
13 participation in construction of a new off-site road be
14 determined by a calculation of the portion of the traffic on
15 that road generated solely from within the proposed
16 development. According to the county, "traffic generated by
17 the development," as that term is used in both plan Roadways

⁵Petitioners also argue that the requirement for construction of the S.E. 132nd Avenue extension is not warranted because, if S.E. 132nd Avenue were blocked at the northern boundary of the proposed subdivision, traffic generated within the proposed subdivision could use S.E. 130th Drive and S.E. 131st Drive for access without adverse impacts on those streets. According to petitioners, it is only the through traffic going to and from S.E. 132nd Avenue to the north of the proposed subdivision which necessitates the construction of the S.E. 132nd Avenue extension. This argument might be relevant to a contention that direct access from the proposed subdivision onto S.E. Hubbard Road is not necessary, if no through traffic on S.E. 132nd Avenue is allowed. However, as we explain in n 3, the hearings officer correctly concluded that the applicant was not requesting a modification of the approved preliminary plat to delete the S.E. 132nd Avenue extension. With regard to the issue of financing the S.E. 132nd Avenue extension, petitioners do not contend that no traffic generated from within the proposed subdivision will use the extension.

1 Policy 9.0 and ZDO 1007.03.F.3, does not mean solely the
2 movement of vehicles to and from the residences of the
3 proposed subdivision. The county argues that other vehicles
4 using the S.E. 132nd Avenue extension are also "traffic
5 generated by the development," because without the
6 construction of the proposed subdivision, that flow of
7 through traffic could not occur.

8 Contrary to the county's assertion, there is nothing in
9 the terms of ZDO 1007.03.F.3, or the parallel provision of
10 plan Roadways Policy 9.0, which limits their applicability
11 to the improvement of existing roadways. These provisions
12 specifically govern the extent to which the county can
13 require a developer to participate financially in the
14 improvement of off-site roadways and, therefore, are
15 directly applicable to the decision at issue in this appeal.
16 Because the county failed to apply plan Roadways Policy 9.0
17 and ZDO 1007.03.F.3, remand is required.

18 As guidance on remand, we note that we do not agree
19 with the county that the phrase "traffic generated by the
20 development" in ZDO 1007.03.F.3 and plan Roadways Policy 9.0
21 is correctly interpreted as including all traffic on S.E.
22 132nd Avenue between S.E. Sunnyside Road and S.E. Hubbard
23 Road, simply because without construction of the proposed
24 subdivision, that flow of through traffic could not occur.
25 We do not understand petitioners to object to being required
26 to assume full financial responsibility for the improvements

1 required to extend S.E. 132nd Ave. within the proposed
2 subdivision, even though those improvements will also
3 benefit the public generally. What petitioners object to is
4 being required to pay the full cost of acquiring off-site
5 property and constructing a street on that off-site
6 property, to implement the county's designation of S.E.
7 132nd Avenue as a collector between S.E. Sunnyside Road and
8 S.E. Hubbard Road. We conclude that, under ZDO 1007.03.F.3
9 and plan Roadways Policy 9.0, the applicant may be assessed
10 the portion of the costs of acquiring and improving the
11 off-site parcel attributable to "traffic generated by" the
12 proposed subdivision. However, the "traffic generated by"
13 the proposed subdivision does not include all the traffic
14 that will utilize the S.E. 132nd Avenue extension.⁶

15 Although we reject the county's expansive reading of
16 ZDO 1007.03.F.3 and plan Roadways Policy 9.0, we
17 nevertheless agree with the county that the phrase "traffic
18 generated by the development" is somewhat ambiguous and,
19 therefore, conclude that remand is appropriate so the county
20 may interpret and apply that language in the first
21 instance.⁷ Fifth Avenue Corp. v. Washington Co., 282 Or

⁶Similarly, we reject the county's suggestion that the second sentence of ZDO 1007.03.F.3 gives the county virtually unfettered discretion in determining the extent of the developer's financial participation in off-site roadway improvements.

⁷In this context, we also note that while the second sentence of plan Roadways Policy 9.0 uses the term "generated by the development," the first sentence uses the phrase "caused by [the] development."

1 591, 599, 581 P2d 50 (1984); Mental Health Division v. Lake
2 County, 17 Or LUBA 1165, 1176 (1989).

3 The first assignment of error is sustained.

4 **SECOND AND THIRD ASSIGNMENTS OF ERROR (PETITIONERS AND**
5 **INTERVENOR-PETITIONER)**

6 In these assignments of error, petitioners contend the
7 county's refusal to modify the conditions of preliminary
8 plat approval to require financial participation by the
9 county in the construction of the S.E. 132nd Avenue
10 extension, thereby requiring the developer to bear the
11 entire cost of this off-site roadway improvement, violates
12 Article I, section 18, of the Oregon Constitution and the
13 Fifth and Fourteenth Amendments to the U. S. Constitution.
14 However, petitioners also argue that plan Roadways Policy
15 9.0 and ZDO 1007.03.F.3 are consistent with, and arguably
16 more stringent than, the limitations on conditions of
17 development approval imposed by the state and federal
18 constitutions. Therefore, petitioners recognize that if
19 this Board decides to remand the county's decision based on
20 petitioners' first assignment of error, it need not resolve
21 the constitutional issues raised under the second and third
22 assignments of error.

23 We agree with petitioners, and do not consider the
24 second and third assignments of error further.

25 The county's decision is remanded.