

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3  
4 JOHN SULLY, JEAN SULLY, CARL )  
5 OATES, ROASALIE OATES, DENNIS )  
6 FRIEND, LINDA FRIEND, BRAD )  
7 LAVINE and CAROL LAVINE, )  
8 )  
9 Petitioners, ) LUBA No. 90-144  
10 )  
11 vs. ) FINAL OPINION  
12 ) AND ORDER  
13 CITY OF ASHLAND, )  
14 )  
15 Respondent, )  
16 )  
17 and )  
18 )  
19 GARY SEITZ and DIANE SEITZ, )  
20 )  
21 Intervenors-Respondent. )

24                      Appeal from City of Ashland.

26 Daniel C. Thorndike, Medford, filed the petition for  
27 review and argued on behalf of petitioner. With him on the  
28 brief was Blackhurst, Hornecker, Hassen & Thorndike & Ervin  
29 B. Hogan.

31 No appearance by respondent.

33           Douglas H. Schmor, Medford, filed the response brief  
34 and argued on behalf of intervenors-respondent. With him on  
35 the brief was Brophy, Duhaime, Mills, Schmor, Gerking &  
36 Brophy.

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

41 REVERSED 03/12/92

43 You are entitled to judicial review of this Order.  
44 Judicial review is governed by the provisions of ORS  
45 197.850.

1                   Opinion by Holstun.

2                   **NATURE OF THE DECISION**

3                   Petitioners appeal a city decision granting outline  
4                   plan approval for a five-lot residential subdivision located  
5                   within the city's acknowledged urban growth boundary.

6                   **MOTION TO INTERVENE**

7                   Gary Seitz and Diane Seitz, the applicants below, move  
8                   to intervene on the side of respondent. There is no  
9                   opposition to the motion, and it is allowed.

10                  **JURISDICTION AND PROCEDURAL HISTORY**

11                  In Sully v. City of Ashland, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
12 90-144, January 31, 1991) (Sully I), we determined that  
13 because the challenged decision granting subdivision outline  
14 plan approval simply applies existing land use regulations  
15 and does not amend the plan or land use regulations or grant  
16 variances or approval for other actions modifying or  
17 amending standards governing the subdivision approval  
18 decision, we lacked jurisdiction under former ORS  
19 197.015(10)(b)(B).<sup>1</sup> In accordance with ORS 19.230 and OAR

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<sup>1</sup>ORS 197.825(1) limits our jurisdiction to "land use decisions." prior to its amendment in 1991, ORS 197.015(10)(b)(B) provided that land use decisions do not include local government decisions which approve or deny "a subdivision \* \* \* located within an urban growth boundary where the decision is consistent with land use standards [.]" (Emphasis added.) Prior to our decision in Sully I, we had construed the emphasized language in ORS 197.015(10)(b)(B) not to require that we review a challenged urban land division on the merits for consistency with land use standards to determine whether we have jurisdiction. Instead, we interpreted that language to limit our jurisdiction to cases where the applicable plan or land use regulations were being amended or modified in some way. See Bartels v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-111, December 3,

1 661-10-075(10), we transferred this appeal to the Jackson  
2 County Circuit Court on January 31, 1991.

3 On February 21, 1991, in Southwood Homeowners v. City  
4 Council of Philomath, 106 Or App 21, 806 P2d 162 (1991), the  
5 Court of Appeals determined this Board incorrectly  
6 interpreted former ORS 197.015(10)(b)(B) and that LUBA must  
7 review challenges of urban land division decisions on the  
8 merits to make the jurisdictional determination, i.e.,  
9 whether the challenged decision was made "consistent with  
10 land use standards." In Southwood, the Court of Appeals  
11 determined that if we conclude the challenged decision is  
12 not consistent with land use standards we are to reverse or  
13 remand the decision; if we determine the challenged decision  
14 is consistent with land use standards, we are to transfer  
15 the decision to circuit court pursuant to ORS 19.230.

16 On July 12, 1991, the Jackson County Circuit Court  
17 referred this case to the Court of Appeals for a  
18 determination of jurisdiction pursuant to ORS 19.230(5). On  
19 October 2, 1991, the Court of Appeals determined that the  
20 circuit court had authority to transfer this case back to  
21 LUBA to determine whether the decision is consistent with  
22 land use standards. The circuit court transferred the

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1990); Southwood Homeowners Assoc. v. City of Philomath, \_\_\_ Or LUBA \_\_\_,  
(LUBA No. 90-103, November 15, 1990), rev'd 106 Or App 21 (1991); Hoffman  
v. City of Lake Oswego, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-067, September 26,  
1990); Meadowbrook Development v. City of Seaside, \_\_\_ Or LUBA \_\_\_ (LUBA  
No. 90-060, September 18, 1990); Parmenter v. Wallowa County, 19 Or LUBA  
271 (1990).

1 record to LUBA on November 22, 1991 and oral argument was  
2 held February 6, 1992.

3 For the reason explained below, the challenged decision  
4 is inconsistent with applicable land use standards and,  
5 therefore, subject to our jurisdiction.

6 **FACTS**

7 The subdivision challenged in this appeal creates a new  
8 cul-de-sac street, Diane's Hill Street.<sup>2</sup> The Diane's Hill  
9 Street right of way begins at Granite Street, which provides  
10 the only access to Diane's Hill Street. The sole dispute in  
11 this appeal is whether Diane's Hill Street exceeds the 500  
12 foot length limitation imposed by Ashland Land Use Ordinance  
13 (ALUO) 18.80.020(11) and 18.88.050(A)(6). If those ALUO  
14 provisions require that the turnaround portion of  
15 cul-de-sacs be included for purposes of calculating the  
16 length of the cul-de-sacs, as petitioners argue, Diane's  
17 Hill Street is longer than 500 feet. However, if, as the  
18 city found, the turnaround portion of a cul-de-sac is  
19 excluded for purposes of computing the length of the  
20 cul-de-sac, Diane's Hill Street is less than 500 feet long.<sup>3</sup>

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<sup>2</sup>A cul-de-sac is a deadend street with a vehicular turnaround at the end of the street.

<sup>3</sup>The city found that the consequence of shortening the cul-de-sac so that it would comply with the 500 foot length limitation (regardless of how the relevant ALUO sections are correctly interpreted) would be that the turnaround portion of the street would be located on much steeper slopes, making construction more difficult, expensive and potentially more environmentally damaging. Petitioners do not dispute the accuracy of that finding. However, they point out that the difficulty, expense and

1   **ASSIGNMENT OF ERROR**

2           "The City of Ashland erred in determining that the  
3         proposed street does not exceed the 500 feet  
4         maximum length under [ALUO] 18.80.020(11) and  
5         18.88.050(A)(6)."

6           ALUO 18.08.700 defines cul-de-sac street as "[a] short  
7         dead-end street terminated by a vehicle turnaround."  
8         ALUO 18.80.020(11) provides the following limit on the  
9         permissible length of cul-de-sacs:

10          "A cul-de-sac shall be as short as possible and  
11         shall have a maximum length of five hundred feet.  
12         All cul-de-sacs shall terminate with a circular  
13         turnaround unless alternate designs for turning  
14         and reversing direction are approved by the  
15         Planning Commission."

16          The parties agree the challenged subdivision was properly  
17         considered under the performance standards applicable to  
18         planned unit developments under ALUO chapter 18.88. ALUO  
19         18.88.050 establishes the following street standards for  
20         planned unit developments:

21          "A. Street Types

22            " \* \* \* \* \*

23          "6. Dead End. Only lanes may be dead end  
24         roads. No dead end road shall exceed  
25         500 feet in length. Dead end roads must  
26         terminate in an improved turnaround as  
27         defined in the Performance Standards  
28         guidelines as provided in Section  
29         18.88.090.

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potential environmental problems of complying with the relevant ALUO provisions does not provide a basis for violating those ALUO provisions if petitioners' interpretation of those provisions is correct. Petitioners contend a variance is required if the city wishes to approve a cul-de-sac violating the requirements of ALUO 18.80.020(11) and 18.88.050(A)(6).

1               "\*\* \* \* \* \*"

2               ALUO 18.88.090(A) provides that the city council may  
3               adopt guidelines for PUDs including "[m]inimum standards for  
4               \* \* \* turnaround and other street standards \* \* \*."  
5               Intervenors-respondent attach to their brief minimum  
6               turnaround standards, which apparently have been adopted by  
7               the city pursuant to ALUO 18.88.090(A). Under those  
8               standards a cul-de-sac may be terminated in a hammerhead  
9               shaped turnaround (resulting in a cul-de-sac that resembles  
10          a croquet mallet), a conventional circular turnaround  
11          (resulting in a cul-de-sac that resembles a tennis racquet)  
12          or a rectangular turnaround at a right angle to the  
13          cul-de-sac (resulting in a cul-de-sac that resembles a golf  
14          club or a hockey stick, depending on the length of the  
15          rectangular turnaround).<sup>4</sup>

16              As an initial point, we are aware of no statutory,  
17              administrative rule or statewide planning goal requirement  
18              that cul-de-sacs be limited to 500 feet or that the city  
19              impose any limitation on the length of cul-de-sacs.  
20              Therefore, if the city wishes to impose a limitation on the  
21              length of cul-de-sacs, it is also within the city's  
22              discretion to establish in its land use regulations how the

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<sup>4</sup>Both the circular and rectangular turnarounds may have parking spaces in the center of the turnaround. As we understand the city's minimum standards, there is no maximum limitation on the length of the parking area included within a rectangular turnaround, so the effective total length of such a cul-de-sac (including the turnaround) could significantly exceed 500 feet from the beginning of the cul-de-sac.

1 limitation is to be calculated. If the city explicitly  
2 provides in its code where to begin and where to stop  
3 measuring the length of a cul-de-sac, this Board likely  
4 would be bound to give effect to such provisions.<sup>5</sup> However,  
5 where, as here, the applicable land use regulations do not  
6 explicitly provide how to measure the length of a  
7 cul-de-sac, we, like the city, must make that determination  
8 applying the land use regulations as they are written and  
9 applying the plain and ordinary meaning of the operative  
10 term "length." See Sarti v. City of Lake Oswego, 106 Or App  
11 594, 597, 809 P2d 701 (1991).

12 In reaching its conclusion that the allowable length of  
13 a deadend street is measured under the ALUO by excluding the  
14 turnaround portion of the deadend street, the city relied on  
15 an opinion of the city attorney. That opinion first

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<sup>5</sup>In fact, after the decision challenged in this appeal was adopted and appealed to this Board, the city apparently amended ALUO 18.88.050(A)(6), but not ALUO 18.80.020(11), to explicitly provide that the turnaround portion of a cul-de-sac is excluded in applying the 500 foot limitation. If, at the time the subject application was filed, the ALUO explicitly provided that in calculating the 500 foot cul-de-sac length limitation the turnaround is not considered, the city's decision would be affirmed. However, the ALUO provisions applicable to the challenged decision are those that were in effect when the subject application was filed, not subsequently amended ALUO provisions. ORS 227.178(3); Kirpal Light Satsang v. Douglas County, 97 Or App 614, 616-17, 776 P2d 1312, rev den 308 Or 382 (1989).

Intervenors-respondent attach to their brief code sections from other jurisdictions that take different approaches in measuring the length of cul-de-sacs. Although none of those code sections explicitly provide that in measuring the length of a cul-de-sac the turnaround portion of the cul-de-sac is to be excluded, we see no reason why a local government could not explicitly provide that the length be calculated in that manner.

1 observes that the question is properly decided by the  
2 language of the ALUO rather than by "previous decisions of  
3 LUBA or the Courts." Intervenors-Respondent's Brief  
4 Appendix C. For the reasons explained above, we agree with  
5 that observation. The opinion then quotes ALUO  
6 18.80.020(11), and concludes that the language of that  
7 section, viewed by itself, suggests that the 500 foot limit  
8 includes the turnaround. As explained below, we agree with  
9 that conclusion as well. The opinion then notes that while  
10 ALUO 18.80.020(11) was adopted in 1980, the standards for  
11 turnarounds adopted by the city pursuant to ALUO 18.88.090  
12 were not adopted until 1989. In view of these separately  
13 and subsequently adopted standards for cul-de-sac  
14 turnarounds, the opinion concludes cul-de-sacs terminate at  
15 the beginning of the turnaround and do not include the  
16 turnaround for purposes of applying the 500 foot length  
17 limitation imposed by ALUO 18.80.020(11) and  
18 18.88.050(A)(6). The city adopted this interpretation in  
19 the challenged decision.

20 Petitioners argue there is simply no sufficient basis  
21 in the relevant ALUO language for excluding the turnaround  
22 portion of a cul-de-sac from the 500 foot length limitation,  
23 and contend the city erred in doing so in this case.  
24 Petitioners' argument is strengthened in our view by the  
25 fact that the turnaround is certainly part of the cul-de-sac  
26 right of way, and nothing in the ALUO explicitly provides

1 that the portion of the right of way occupied by the  
2 turnaround is to be treated differently from the rest of the  
3 right of way. Again, while we see no reason why the city  
4 may not amend the ALUO specifically to provide that the  
5 turnaround portion of a cul-de-sac right of way is to be  
6 excluded from the length limitation, the question is whether  
7 the applicable ALUO provisions do so as written.

8 It is possible to construe the language in ALUO  
9 18.08.700 defining cul-de-sac as a road "terminated by a  
10 vehicle turnaround" as providing it is the turnaround that  
11 terminates (i.e. ends) the cul-de-sac for purposes of  
12 measuring the 500 foot limitation. To the extent such a  
13 construction is possible, it supports the city's  
14 interpretation. However, the city did not base its decision  
15 on this language of ALUO 18.08.700, and the limitation  
16 imposed by ALUO 18.80.020(11) and 18.88.050(A)(6) suggests a  
17 contrary conclusion. ALUO 18.80.020(11) requires that  
18 cul-de-sacs "shall terminate with a circular turnaround  
19 unless alternate designs \* \* \* are approved" and ALUO  
20 18.88.050(A)(6) requires that deadend roads "terminate in an  
21 improved turnaround \* \* \*." We believe that in determining  
22 the length of a street that terminates "with" or terminates  
23 "in" a turnaround, the turnaround portion of the street must  
24 be included.

25 The city's contrary decision relies on the city  
26 attorney's opinion, which assigns determinative weight to

1 the fact adoption of the minimum standards for turnarounds  
2 postdated the 500 foot limit on cul-de-sacs provided by ALUO  
3 18.80.020(11) and 18.88.050(A)(6). We fail to see how the  
4 timing of the city's adoption of such minimum standards for  
5 turnarounds is relevant, much less determinative.  
6 Presumably, prior to adoption of these standards, circular,  
7 hammerhead and rectangular turnarounds all were permissible,  
8 and the dimensions of the turnaround were not directly  
9 limited. As we understand petitioners' argument, prior to  
10 the city's adoption of minimum standards for turnarounds, a  
11 cul-de-sac could employ a turnaround of whatever shape or  
12 dimension a developer wished, so long as the 500 foot total  
13 length limitation on the street right of way was not  
14 exceeded. We understand petitioners to argue the same is  
15 true under the minimum turnaround standards adopted pursuant  
16 to ALUO 18.88.090, except that in addition to the 500 foot  
17 total cul-de-sac limitation, the minimum turnaround  
18 dimensions must be observed and included within the 500 foot  
19 total cul-de-sac limitation.<sup>6</sup>

20 We agree with petitioners that under the relevant ALUO  
21 provisions, excluding the turnaround portion of a cul-de-sac  
22 right of way from the 500 foot length limitation is  
23 unreasonable and incorrect. The language of the ALUO

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<sup>6</sup>As noted above at n 5, ALUO 18.88.050(A)(6) was amended after the subject application was filed, and we express no position concerning the correct manner of measuring the length of cul-de-sacs in planned unit developments under current ALUO provisions.

1 provides no basis for making such a distinction, and the  
2 city's decision to the contrary is erroneous. The city may  
3 amend the ALUO to achieve that result, but it may not do so  
4 by interpreting the relevant code language in a manner  
5 contrary to its plain and ordinary meaning. A cul-de-sac  
6 street is generally understood to continue to the end of  
7 whatever turnaround is provided; it is not generally  
8 understood to end at the point the right of way begins to  
9 widen to accommodate the turnaround.

10 The assignment of error is sustained.

11 The city's decision is reversed.

12