

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 LOUISIANA PACIFIC, a Delaware)
5 Corporation,)
6)
7 Petitioner,)
8)
9 vs.)
10)
11 UMATILLA COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 CONFEDERATED TRIBES OF THE,)
18 UMATILLA INDIAN RESERVATION,)
19)
20 Intervenor-Respondent.)

LUBA No. 93-084
FINAL OPINION
AND ORDER

21
22
23 Appeal from Umatilla County.
24

25 D. Rahn Hostetter, Enterprise, filed the petition for
26 review and argued on behalf of petitioner. With him on the
27 brief was Mautz, Baum, Hostetter & O'Hanlon.
28

29 William C. Jones, Pendleton, filed a response brief and
30 argued on behalf of respondent.
31

32 Daniel W. Hester, Boulder, Colorado, filed a response
33 brief and argued on behalf of intervenor-respondent. With
34 him on the brief was Fredericks, Pelcyger, Hester & White.
35

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

39 REMANDED 12/14/93
40

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision conditionally
4 approving its request for approval of a farm dwelling.

5 **MOTION TO INTERVENE**

6 Confederated Tribes of the Umatilla Indian Reservation,
7 moves to intervene on the side of respondent in this matter.
8 There is no opposition to the motion, and it is allowed.

9 **FACTS**

10 Petitioner submitted an application for a farm dwelling
11 to be located on a 1,542 acre parcel zoned Grazing/Farm
12 (GF). The 1,542 acre parcel is part of an ownership
13 totaling approximately 28,000 acres. The county planning
14 commission conducted three public hearings and approved the
15 application with conditions. That decision was appealed to
16 the board of commissioners. At the conclusion of a May 13,
17 1993 public hearing, the board of commissioners voted to
18 deny the appeal and uphold the planning commission's
19 decision. Subsequently, at its May 27, 1993 meeting, the
20 board of commissioners voted on the matter again and adopted
21 the challenged decision approving the application and adding
22 a number of conditions which petitioner challenges in this
23 appeal.

24 **FIRST ASSIGNMENT OF ERROR**

25 Umatilla County Development Ordinance (UCDO) 16.051.6.p
26 provides as follows:

1 "Issuance of order on the decision. Within ten
2 (10) working days of the date of a decision by the
3 [board of commissioners], a formal, written order
4 shall be prepared and signed. This order shall
5 incorporate the decision, any conditions of
6 approval, and the Findings and Conclusions leading
7 to the decision. This order shall be signed by
8 the presiding officer of the hearing, or a
9 designee. The date this order is signed shall be
10 considered the actual date of this decision for
11 purposes of appeal to a higher authority."

12 Under this assignment of error, petitioner contends the
13 board of commissioners' decision on May 13, 1993 was to
14 uphold the planning commission decision approving the
15 requested farm dwelling. Petitioner contends the board of
16 commissioners considered adding conditions of approval
17 during its May 13, 1993 deliberations, but did not vote to
18 do so.¹ Nevertheless, following the close of the
19 evidentiary record on May 13, 1993, the county advised
20 petitioner that the board of commissioners would consider
21 imposing conditions of approval that differed from those
22 imposed by the planning commission. Petitioner was provided
23 a copy of the proposed conditions that ultimately were
24 adopted by the board of commissioners. Petitioner advised
25 the county of its objections to those conditions on May 27,
26 1993.

27 At its May 27, 1993 meeting, ten working days after its
28 May 13, 1993 oral decision, the board of county

¹Petitioner contends the board of commissioners' oral decision on May 13, 1993 let stand the planning commission's conditions of approval.

1 commissioners voted to approve the farm dwelling request,
2 but in doing so imposed additional conditions. Petitioner
3 contends the board of commissioners erred by not adopting an
4 order approving the farm dwelling with the planning
5 commission conditions of approval, as the board of
6 commissioners' May 13, 1993 vote indicated it intended to
7 do.

8 Respondent contends the board of commissioners'
9 decision is not final until it is reduced to writing and
10 signed in accordance with UCDO 16.051.6.p. We understand
11 respondent to argue that even if the conditions included in
12 the written decision adopted by the board of commissioners
13 on May 27, 1993 were not specifically identified or approved
14 in the action taken by the board of commissioners on May 13,
15 1993, there is no error or prejudice to petitioner's
16 substantial rights. Respondent points out that petitioner
17 was aware of the conditions the board of commissioners
18 intended to adopt on May 27, 1993 and objected to those
19 conditions before they were adopted.

20 We agree with respondent's characterization of the May
21 13, 1993 oral decision as the county's preliminary decision
22 and the May 27, 1993 written decision as its final
23 decision.² See Sokol v. City of Lake Oswego, 18 Or LUBA

²The discussion appearing at Record 24 makes it clear that while the oral decision rendered on May 13, 1993 adopted the planning commission's decision and findings, the decision adopted by the board of commissioners on that date was preliminary.

1 375, 397-402 (1989), aff'd 100 Or App 594 (1990). As we
2 have explained on numerous occasions, it is the final
3 written decision of the local government that is subject to
4 review by this Board. See Waker Associates, Inc. v.
5 Clackamas County, 21 Or LUBA 588, 591 (1991) (and cases
6 cited therein). Where, as here, petitioner can neither
7 point to a procedural error in the manner in which the final
8 written decision was adopted, nor identify any procedural
9 error that prejudiced its substantial rights, petitioner's
10 only remedy is to challenge the final written decision on
11 its merits.³ Admittedly, this places a responsibility on
12 parties in a local land use proceeding to continue their
13 involvement until the final written decision is adopted. A
14 party may not assume that the final written decision will
15 precisely reflect the party's understanding of the oral
16 decision. However, absent some legal requirement to the
17 contrary, the local government is not bound to assure that
18 its final written decision conforms to its oral decision in
19 all particulars. Sokol v. City of Lake Oswego, supra.
20 Indeed, one of the functions of the written decision is to
21 clarify what may have been left unclear in the oral decision
22 and ensure that the ultimate decision is consistent with the

³We are authorized to reverse or remand a decision for procedural error, only where the procedural error results in prejudice to petitioner's substantial rights. ORS 197.835(7)(a)(B). We have explained that the substantial rights of parties referred to by the statute are an adequate opportunity to prepare and present their case and a full and fair hearing. Muller v. Polk County, 16 Or LUBA 771, 775 (1988).

1 findings of fact ultimately adopted by the local government.
2 So long as the local government takes appropriate action to
3 adopt that final written decision as its own, it is the
4 decision that constitutes the land use decision subject to
5 our review. Id.

6 The first assignment of error is denied.

7 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

8 McKay Creek road, a county road occupying a 40 foot
9 right-of-way, now terminates at the western edge of
10 petitioner's property, at which point petitioner has erected
11 a gate to block entry onto its property.⁴ Prior to 1991,
12 McKay Creek Road entered petitioner's property some distance
13 north of the proposed dwelling. The former McKay Creek Road
14 passed north of the proposed dwelling and continued in an
15 easterly direction for approximately 2.5 miles to a point
16 where the former county road ended on intervenor's property.
17 A map included in the record shows the former county right-
18 of-way in a bold dashed line.⁵ Where the bold dashed line
19 ends, a lighter dashed line continues and passes through
20 petitioner's property and onto adjoining properties to the
21 east of petitioner's property. The parties agree that the
22 bold dashed line shows the former county right-of-way that

⁴Apparently, access to the proposed dwelling will be provided by a private roadway which connects with McKay Creek Road at its present terminus.

⁵The map is labeled "Oversized Exhibit #3."

1 was vacated by the county in 1991, at petitioner's request.

2 One of the conditions of approval added by the board of
3 commissioners is as follows:

4 "The gate on McKay Creek Road shall be removed and
5 McKay Creek Road (that portion vacated by Order of
6 the Board of Commissioners on November 6, 1991)
7 shall be reopened and dedicated to the county for
8 use by the public. The County shall compensate
9 the landowner for improvements made to the road
10 during the period in which Louisiana-Pacific was
11 the owner (date of Board action to vacate through
12 the date of final decision on [the] Farm Dwelling
13 request * * *). The amount of money the County
14 shall reimburse to Louisiana-Pacific shall be
15 determined by mutual agreement, and if necessary,
16 an independent dispute resolution team shall
17 conduct the negotiation." Record 11.

18 Petitioner argues that unless there is a reasonable
19 relationship between the impacts that may be expected from
20 the proposed farm dwelling and the requirement that
21 petitioner dedicate over two miles of right-of-way for
22 public use, the above condition constitutes an
23 unconstitutional taking of its property.⁶ Petitioner
24 contends the record shows no such reasonable relationship

⁶Petitioner does not specify whether its constitutional challenge is brought under the federal or state constitution or both. However the cases cited by petitioner all concern the Takings Clause of the Fifth Amendment to the United States Constitution. That clause is as follows:

"[N]or shall private property be taken for public use, without just compensation."

The "Takings Clause" is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Penn Central Trans. Co. v. New York City, 438 US 104, 122, 98 S Ct 2646, 57 L Ed 2d 631 (1978).

1 exists.⁷

2 There can be no doubt that, in the absence petitioner's
3 request for approval of a farm dwelling on the subject
4 property, a county requirement that petitioner dedicate over
5 two miles of right-of-way across petitioner's property would
6 constitute an unconstitutional taking of petitioner's
7 property. See Nollan v. California Coastal Comm'n, 483 US
8 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). This would be
9 true no matter how worthy the public purpose to be served.
10 In such circumstances the local government may take the
11 needed property, but it must pay the owner just compensation
12 of the property taken.

13 However, where the property owner is seeking
14 development approval, a local government may, where
15 appropriate circumstances exist, require uncompensated
16 dedications or exactions. Local governments may impose such
17 exactions where the exaction serves the same governmental
18 purpose that denying the request for permit approval would
19 serve.⁸

⁷In view of our disposition of these assignments of error, we need not comment on the propriety of the county's proposed method of arriving at an amount to compensate petitioner for improvements constructed on the right-of-way.

⁸For example, a local government faced with a dangerously overburdened local street might be able deny requests for additional subdivision of land along that street, until the street's capacity is upgraded. The public purpose substantially advanced by such a development ban would be avoiding additional danger to the public that must travel the local street. Alternatively, the local government might approve a request to subdivide

1 The Oregon Supreme Court's recent decision in Dolan v.
2 City of Tigard, 317 Or 110, 854 P2d 437 (1993), cert.
3 granted ___ US ___ (1993), discusses at length the nature of
4 the relationship or nexus required between a requirement for
5 an uncompensated dedication or conveyance and the impacts of
6 the development on which the exaction is levied. In order
7 for such exactions to pass constitutional muster under the
8 Fifth and Fourteenth Amendments to the U.S. Constitution,
9 the required dedication must be reasonably related to the
10 needs created by the use for which approval is sought. Id.
11 at 118-20.

12 In Dolan, the property owner sought approval to expand
13 an existing commercial business and parking lot on a 1.67
14 acre parcel. In approving the request, the city required
15 dedication of land within the 100-year flood plain for
16 floodway improvements and a 15-foot strip of land adjacent
17 to the flood plain for a pedestrian/bicycle pathway. In
18 upholding the requirement for uncompensated dedications in
19 that case, the Oregon Supreme Court found a reasonable
20 relationship existed between the required dedication and the
21 impacts associated with the proposed use. The court
22 concluded the record adequately showed the expanded
23 commercial use would increase traffic congestion that could
24 be offset by the pedestrian/bicycle pathway and the

land along the street but impose an exaction that the developer dedicate
land and widen the local street and make it safer.

1 increased amount of impervious surface justified the
2 required floodway improvements.

3 The decision challenged in this appeal states that the
4 condition is necessary to address access problems of
5 intervenor and adjoining property owners.

6 "The Board of Commissioners finds that the
7 Skillman Family and the Confederated Tribes of the
8 Umatilla Indian Reservation, and other property
9 owners who may be similarly situated, have been
10 blocked access to their property and prescriptive
11 use of road 1050, as a result of the road vacation
12 of November 6, 1991. The Skilman [sic] Family,
13 members of the [Confederated Tribes of the
14 Umatilla Indian Reservation], and other County
15 residents presented testimony demonstrating
16 historical use of the vacated portion of McKay
17 Creek Road for cattle drives, winter access,
18 access to private property and access to the
19 public portion of McKay Creek Road."⁹ Record 5.

20 The problem with the above justification is that the
21 cited access problems result from the county's vacation of
22 the right-of-way, and have nothing to do with the proposed
23 farm dwelling. The old McKay Creek Road right-of-way passed
24 approximately 1/2 mile north of the proposed dwelling and

⁹Although the parties dispute whether the required rededication of McKay Creek Road would actually provide access to other properties which lack other access, we need not consider that question. Neither do we consider whether there are other legal avenues available to respond to petitioner's efforts to block access over the vacated portion of McKay Creek Road. For purposes of this appeal, we assume the rededication of McKay Creek Road would substantially advance a legitimate public purpose to provide intervenor and other adjoining property owners access they do not currently enjoy. Therefore, the only issue that must be decided to resolve petitioner's challenge of the above quoted condition is whether the exaction (i.e. the requirement that the former right-of-way be rededicated and reopened) is reasonably related to the impacts that may be attributed to the farm dwelling approved by the county.

1 then continues away from the dwelling. The cited need to
2 provide public access is reasonably related to the 1991
3 decision vacating the McKay Creek Road right-of-way and
4 subsequent actions by petitioner to block access across the
5 now vacated right-of-way. However, that need has nothing to
6 do with the proposed farm dwelling.

7 A second reason advanced by respondent for imposing the
8 challenged condition is a need to provide emergency vehicle
9 access to adjoining properties. We fail to see any
10 connection between that need and the proposed dwelling.
11 Again, the right-of-way would pass approximately 1/2 mile
12 north of the proposed dwelling and then continues away from
13 the dwelling. While the required right-of-way might improve
14 emergency vehicle access to adjoining properties or other
15 parts of petitioner's property, there is no reasonable
16 relationship between an exaction to address that need or
17 purpose and the proposed farm dwelling.¹⁰

18 Before concluding our discussion of the second and
19 third assignments of error, we note it is clear from the
20 record and the arguments presented in respondent's brief
21 that a dispute exists between the county and petitioner
22 concerning possible future plans by petitioner to use its
23 large land holding as a private hunting preserve and to use

¹⁰The only evidence cited by respondent on this point relates to needed improvements around the proposed homesite, and provides no justification for requiring rededication of the McKay Creek Road right-of-way.

1 the proposed farm dwelling as a hunting lodge. Respondent
2 suggests petitioner's actions to restrict access across the
3 old McKay Creek Road, following vacation of the county
4 right-of-way, is evidence of petitioner's intent to bar the
5 public and create a private hunting preserve. Respondent
6 contends it is appropriate for the county to look at the
7 proposed farm dwelling with petitioner's apparent intention
8 to create a private hunting preserve in mind. Similarly,
9 respondent and intervenor argue it is appropriate to look
10 beyond the requested farm dwelling to petitioner's use of
11 the entire 28,000 acre property for farm, timber and related
12 purposes in imposing conditions of approval.

13 It is entirely appropriate for respondent to impose
14 conditions to ensure that the proposed farm dwelling in fact
15 will be a farm dwelling and will be limited to uses
16 appropriate for a farm dwelling. However, it is not
17 appropriate for the county to use the occasion of
18 petitioner's request for approval of a farm dwelling to
19 exact concessions or impose limitations that have no
20 reasonable connection to the proposed farm dwelling.

21 Respondent's concerns about petitioner's ultimate
22 planned use of the property as a private hunting preserve
23 may well be valid. However, addressing those concerns must
24 await implementation of that use. Should petitioner elect
25 to institute such a use, either piecemeal or by way of a
26 more integrated request for approval, the permissibility of

1 that use will be governed by any approval criteria in the
2 county's comprehensive plan and development ordinance that
3 may govern such activity. Similarly, respondent may not use
4 the request for permit approval for a farm dwelling to
5 impose a condition relating to petitioner's other existing
6 farm or forest uses that are permitted under the applicable
7 county comprehensive plan and development ordinance.
8 Petitioner is not seeking approval from the county for such
9 permitted uses, and it is not appropriate for the county to
10 rely on concerns it may have about such permitted uses to
11 impose the disputed condition.

12 Finally, respondent suggests the required right-of-way
13 is justified to provide access to ensure compliance with
14 certain conditions of approval discussed later in this
15 opinion. The short answer to this argument is that a right-
16 of-way that only comes within approximately 1/2 mile of the
17 subject farm dwelling site, and then travels away from the
18 dwelling, will not reasonably advance that purpose.
19 Therefore, even if we agreed that the county could require
20 dedication of a public right-of-way onto petitioner's
21 property for purposes of code enforcement, the challenged
22 condition would not serve that purpose.

23 The second and third assignments of error are
24 sustained.

25 **FOURTH ASSIGNMENT OF ERROR**

26 In addition to the right-of-way dedication condition

1 discussed above, the board of county commissioners included
2 five additional conditions of approval that petitioner
3 challenges under the fourth assignment of error. Those
4 conditions are as follows:

5 "I. A site plan of the farm dwelling shall be
6 submitted and reviewed by the Board of
7 Commissioners prior to issuance of a zoning
8 permit.

9 * * * * *

10 "N. All occupants of the dwelling must be
11 actively engaged in the farming operation, or
12 be members of the immediate family of those
13 so engaged, or their temporary personal
14 guests (such as friends or relatives).

15 "O. The day to day activities on the subject
16 property shall be principally directed to the
17 farm activity specified.

18 "P. There shall be no boarding of persons for a
19 fee or otherwise such as that occurring at a
20 guest ranch, dude ranch or hunting lodge.

21 "Q. Any activity which is not directly a part of
22 the resources activity permitted outright
23 within the GF zone requires separate
24 application and approval of a conditional use
25 permit." Record 10-11.

26 **A. Farm Dwelling Site Plan**

27 With regard to condition "I" above, petitioner argues
28 the challenged decision gives no idea what the referenced
29 site plan is to be reviewed for. Petitioner contends as
30 follows:

31 "The UCDO provides no guidance, criteria, or
32 restrictions on the design, size or configuration
33 of a farm dwelling. Neither does it call for
34 review of the site plan by any county authority."

1 Petition for Review 12.

2 Respondent argues the farm dwelling request is governed
3 by UCDO 3.034 and that the county requires the conditional
4 use procedures set out at UCDO 7.020(4) be followed to
5 determine whether relevant criteria are met. UCDO 7.020(4)
6 requires that a zoning permit be obtained prior to
7 construction. According to respondent the planning
8 department zoning permit application form "has as one of its
9 components, a plot (or site) plan."¹¹ Respondent's Brief
10 11.

11 As an initial point, UCDO 3.064, not UCDO 3.034,
12 establishes the criteria for approval of a farm dwelling in
13 the Grazing/Farm (GF) zone. The challenged decision finds
14 that the criteria for approval of a farm dwelling set out at
15 UCDO 3.064.2 are met. We fail to see how the disputed
16 condition is needed to ensure compliance with approval
17 criteria that have already been found to be satisfied.
18 Additionally, respondent cites no UCDO provision providing
19 that requests for farm dwelling approval in the GF zone must
20 follow conditional use procedures. To the contrary, UCDO
21 3.064 provides that farm dwellings are a use permitted with
22 a zoning permit. Therefore, while we do not agree with the
23 reasoning expressed in respondent's brief about why a zoning

¹¹Respondent attaches to its brief a copy of a form entitled "Umatilla County Zoning Permit." That form has blanks for information and a space for drawing a "Plot Plan."

1 permit is required, UCDO 3.063 makes it clear that a zoning
2 permit is required prior to construction of a farm dwelling
3 in the GF zone.

4 As far as we can tell, the form attached to
5 respondent's brief simply requires the provision of setback
6 and dimensional information.¹² UCDO 1.050 provides that
7 zoning permits are issued by the planning director.
8 Decisions by the planning director are appealable to the
9 planning commission and, ultimately, to the board of county
10 commissioners. UCDO 16.020. While the UCDO apparently
11 includes no specific provision authorizing initial review of
12 a zoning permit by the board of commissioners, as opposed to
13 appellate review, we do not believe imposition of the
14 challenged condition constitutes reversible error. Even if
15 the condition constitutes error, the error is procedural and
16 petitioner does not explain how its substantial rights will
17 be prejudiced by requiring board of commissioners review
18 prior to issuance of the zoning permit.

19 For the reasons explained above, we conclude the
20 challenged condition provides no basis for reversal or
21 remand.

¹²The decision challenged in this appeal is a discretionary decision determining that relevant approval criteria are met. As far as we can tell from the parties' arguments, the zoning permit decision is ministerial, and a zoning permit must issue, provided certain information is supplied and required setbacks are observed.

1 **B. Remaining Conditions**

2 In response to petitioner's arguments concerning the
3 remaining conditions quoted above, respondent answers that
4 petitioner's attorney stipulated during the December 3, 1992
5 planning commission meeting that those conditions could be
6 imposed.

7 Because petitioner stipulated that the other conditions
8 cited above could be imposed as conditions of approval,
9 petitioner may not now attack those conditions. See
10 Newcomer v. Clackamas County, 92 Or App 174, 186-87, 758 P2d
11 369 (1988).

12 The fourth assignment of error is denied.

13 **FIFTH ASSIGNMENT OF ERROR**

14 Under this assignment of error, petitioner challenges
15 the following condition:

16 "Property [owner] shall give written notice of its
17 intent to conduct surface disturbing activities on
18 the house site project to the Confederated Tribes.
19 The [Confederated Tribes] shall have 30 days from
20 the date of such notice to complete a pedestrian
21 survey, and if any cultural resources are
22 identified, the parties will work together to
23 determine the least adverse affect [sic] and
24 proceed pursuant to that determination. In
25 conducting the survey, the [Confederated Tribes]
26 shall be accompanied by the [Owner's]
27 representative. As to the currently disturbed
28 site, notice shall be deemed to be given as of
29 February 1, 1993." Record 10.

30 As with the conditions discussed immediately above under the
31 fourth assignment of error, petitioner's attorney agreed to
32 the disputed condition and may not now challenge the board

1 of commissioners' decision to impose the condition.

2 The fifth assignment of error is denied.

3 **SIXTH ASSIGNMENT OF ERROR**

4 Under its final assignment of error, petitioner cites
5 the following statement made by one of the members of the
6 board of county commissioners and argues it demonstrates he
7 had improper ex parte contacts.

8 "If you visit with people from Pilot Rock, as I
9 have done, without exception, this thinly veiled
10 plan [concerning the hunting preserve] is known to
11 them." Record 22.

12 Concerns that petitioner actually plans to use its
13 property as a hunting preserve and the proposed dwelling as
14 a hunting lodge were expressed frequently during the local
15 proceedings. We agree with respondent that the above
16 statement, alone, does not indicate the county commissioner
17 engaged in ex parte contacts.

18 The sixth assignment of error is denied.

19 The only error sustained above relates to the condition
20 challenged under the second and third assignments of error
21 requiring rededication of the former McKay Creek Road
22 right-of-way. That condition does not appear to have been
23 relied upon in the remaining portion of the decision where
24 the county found that all relevant approval standards are
25 met. However, we are unwilling to speculate that such is
26 the case. See Skydive Oregon, Inc. v. Clackamas County, 25
27 Or LUBA 294, 310-11, aff'd in part, rev'd in part 122 Or App

1 342 (1993). We therefore remand the challenged decision to
2 the county for disposition consistent with our decision that
3 the condition is unconstitutional in the circumstances
4 presented in this case.

5 The county's decision is remanded.