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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
TILLAMOOK COUNTY,)
)
Respondent,)
)
and)
)
ED MYERS and WILMA MYERS,)
)
Intervenors-Respondent.)

LUBA No. 95-064
FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Jeffrey L. Kleinman, Portland, filed the response brief and argued on behalf of intervenors-respondent.

LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 12/01/95

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the board of county
4 commissioners approving a six-lot subdivision with one-acre
5 lots in a Rural Residential zone.

6 **MOTION TO INTERVENE**

7 Ed Myers and Wilma Myers (intervenors) move to
8 intervene on the side of the respondent in this appeal.
9 There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 In August, 1994, intervenors filed applications for
12 subdivision approval and conditional use approval of their
13 proposed development on six acres of a 90-acre tract.
14 Intervenors proposed to divide the six acres into six, one-
15 acre lots. The proposed subdivision is part of a 90-acre
16 tract owned by intervenors, which is included within a
17 larger area of approximately 171 contiguous acres, all zoned
18 Rural Residential and included in a "noncommunity rural
19 area."¹ The proposed subdivision would be reached by
20 traveling 1.1 miles down Hughey Lane and then one-quarter
21 mile down Marvin Road, which abuts the subdivision. The
22 subdivision lots are grouped around a cul-de-sac off Marvin
23 Road.

¹Although the present proposal is for a six-lot subdivision, the applicant made clear at the outset that the proposal is for the first phase of a larger development. Record 195, 241.

1 After the planning commission denied the applications,
2 intervenors appealed to the board of commissioners, which
3 reviewed the applications de novo. The board of
4 commissioners held three hearings at which it accepted
5 testimony, argument and evidence. On February 22, 1995, the
6 board of commissioners voted to reverse the planning
7 commission and approve the applications. The board of
8 commissioners' decision was signed on March 20, 1995. This
9 appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 The minimum lot size in the Rural Residential zone is
12 two acres, unless the eight criteria listed in LUO
13 3.010(4)(k) are satisfied, in which case lots as small as
14 20,000 square feet may be allowed. The proposed subdivision
15 would contain lots of one acre. Petitioner accepts the
16 county's findings that LUO 3.010(4)(k)(1) through (4), (7)
17 and (8) are satisfied. Petitioner challenges the county's
18 interpretation of LUO 3.010(4)(k)(5) and (6) to allow the
19 one-acre lots. Petitioner contends the interpretation is
20 inconsistent with the Tillamook County Comprehensive Plan
21 (TCCP) policies implemented by LUO 3.010(4)(k).

22 LUO 3.010(4)(k) states, in relevant part:

23 "The minimum lot size may be as small as 20,000
24 square feet if the following conditions are met:

25 * * * * *

26 "5. Public or private roads providing access to
27 the lots shall meet the standards as

1 contained in the County Land Division
2 Ordinance.

3 "6. Smaller parcels [less than two acres] are

1 compatible with the character of the
2 residential development in the area.

3 * * * * *

4 LUO 3.010(4)(k) implements comprehensive plan policies for
5 noncommunity rural areas. Record 242. Among these plan
6 provisions is TCCP Urbanization (Goal 14) Policy 3.17
7 (Policy 3.17), which states:

8 "Tillamook County recognizes that development
9 densities in rural areas have significant impacts
10 on roadways, sewage disposal, water quality and
11 quantity and nearby resource lands. Tillamook
12 County will set its minimum lot size requirement
13 in rural noncommunity areas at two acres in order
14 to prevent adverse impacts. Higher densities will
15 be allowed on a conditional basis where the
16 cumulative impact of greater densities is not
17 significant." (Emphasis added.)

18 The plan findings in support of Policy 3.17 state, in
19 relevant part:

20 * * * Tillamook County has large areas that are
21 appropriate for rural residential development and
22 is likely to have problems unless it has
23 reasonable lot sizes to govern future development.
24 There are four major areas of concern affected by
25 rural lot sizes. These include traffic
26 congestion, water quality, water availability, and
27 impacts on resource lands.

28 "The impacts of dense rural development are not
29 felt immediately because development over small
30 areas is buffered by the large amounts of resource
31 land which surround them. In fact the rural
32 characteristics that people seek by moving to
33 rural areas may not be due to their property at
34 all. Those who live on small lots are getting
35 their rural benefits from surrounding undeveloped
36 properties. But if all the surrounding properties
37 are developed with small lots, the area loses its
38 rural characteristics because no one has provided

1 the open space.

2 "This problem is compounded by the desires of
3 property owners to have the same development
4 rights as their neighbors. The first developments
5 at high densities may have little effect on the
6 area because of the buffering provided by
7 neighboring large undeveloped parcels surrounding.
8 By the time that negative public impacts are felt,
9 a lot size precedent has been formed which may be
10 difficult to change. The owners of undeveloped
11 property would think it unfair that they should
12 have less development options than their neighbors
13 had although continued development at the higher
14 density will mean that the County will have to
15 take other corrective action in order to alleviate
16 problems.

17 "The effect of uncoordinated development on roads
18 is one area of concern. * * *

19 ** * * * *

20 "The problem is actually more complicated because
21 roads in rural areas become pedestrian and bicycle
22 routes since there are no sidewalks.

23 "The streets can also become play areas for
24 children. The highway that once was a blessing to
25 rural residents because it afforded easy access to
26 town, now becomes a nightmare because of the
27 danger it presents to their children." (Emphasis
28 added.)

29 Petitioner argues generally that LUO 3.010(4)(k)(5) and
30 (6) must be interpreted consistently with the concern
31 expressed in Policy 3.17 over the effects of the cumulative
32 impacts of greater densities. Petitioner contends the
33 county's interpretation is not consistent with Policy 3.17
34 and thus violates ORS 197.829(1) through (3) (1993

1 edition).²

2 **LUO 3.010(4)(k)(5)**

3 The challenged decision interprets LUO 3.010(4)(k)(5)
4 to apply only to Marvin Road and the proposed subdivision's
5 cul-de-sac. Petitioner contends that to be consistent with
6 Policy 3.17, the county must interpret LUO 3.010(4)(k)(5) as
7 applying as well to Hughey Lane.

8 Intervenor argues that Policy 3.17 is aspirational,
9 pointing out that it does not set out approval criteria for
10 the land use permit decision in question. See Stotter v.
11 City of Eugene, 18 Or LUBA 135, 146-47 (1989). We agree

²ORS 197.829 was amended by the 1995 legislature. ORS 197.829(1) through (3) were renumbered as ORS 197.829(1)(a) through (c). ORS 197.829 (1995 edition) provides:

"(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.

"(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

1 that Policy 3.17 does not contain specific approval
2 criteria. Nevertheless, it provides a context for the
3 county's interpretation of LUO 3.010(4)(k)(5) and (6). It
4 states an underlying purpose or policy with which, under
5 ORS 197.829(1)(b) and (c) (1995 edition), the county's
6 interpretation of LUO 3.010(4)(k)(5) and (6) must be
7 consistent.

8 Standing alone, the county's interpretation of
9 LUO 3.010(4)(k)(5) is within its interpretive discretion.
10 See Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d
11 854, rev den 320 Or 272 (1994). It is not "so wrong as to
12 be beyond colorable defense." Id. However, Zippel is
13 expressly limited to the interpretation of a local ordinance
14 provision. The Court of Appeals made clear in Zippel that
15 it did not address the issue of compliance with the state
16 and local requirements incorporated by the local ordinance.
17 Id. at 463.

18 The county's decision is inconsistent with the express
19 language, purpose and policy underlying LUO 3.010(4)(k)(5),
20 as these are stated in Policy 3.17 and its supporting
21 findings. The two-acre minimum lot size was expressly
22 chosen to avoid adverse impacts on certain specified
23 features, including roadways. Greater densities are to be
24 permitted only when the cumulative impact is not
25 significant. As noted in the findings to Policy 3.17,
26 permitting six one-acre lots could easily create "a lot size

1 precedent" that would be difficult to change and could be
2 used to justify one-acre lots on the balance of intervenor's
3 90-acre tract. The above-quoted language from the findings
4 makes clear the drafters of the TCCP recognized that
5 incremental approvals result in negative cumulative impacts
6 on roadways.

7 Intervenor argues the impact of the three extra lots
8 created by allowing one-acre, as opposed to two-acre lots,
9 in the proposed subdivision is negligible, and certainly
10 does not warrant requiring improvements to Hughey Lane.
11 However, it is clear from the above-quoted findings in
12 support of Policy 3.17 that the plan's drafters believed
13 that uncoordinated development would have substantial
14 negative impacts on county roads. The challenged
15 decision states:

16 "Staff expressed a concern based upon the possible
17 ultimate build-out of the Applicants' entire 90
18 acres. We find that this eventuality is not
19 before us here, and the proper subject of this
20 proceeding is the six lots in question." Record
21 13.

22 However, Policy 3.17 does not allow the county to apply the
23 criteria of LUO 3.010(4)(k) in isolation each time a
24 proposal for a subdivision of less than two-acre lots is
25 made. Allowing small pockets of greater density on the
26 basis that when viewed in isolation, they have negligible
27 effects will result in uncoordinated development.

28 Finally, intervenor argues that the reference in

1 LUO 3.010(4)(k)(5) to the standards contained in the County
2 Land Division Ordinance (LDO) limits the application of
3 LUO 3.010(4)(k)(5) to the cul-de-sac and Marvin Road.
4 Intervenor relies on LDO 41(1)(c), which provides:

5 "STREETS. The developer shall grade and improve
6 all streets in the subdivision partition, and
7 shall extend such streets to the paving line of
8 existing streets, in conformance with standards
9 contained in this ordinance. Street improvements
10 shall include related improvements such as curbs
11 and shoulders to the extent that they are required
12 by the density or character of development.
13 Improvements may be required by the Public Works
14 Department on streets serving, but not within the
15 boundaries of, the subdivision. Such improvements
16 which are required in areas not within the plat
17 perimeter shall be limited to the extent required
18 to serve the proposed subdivision."

19 The challenged decision finds "on the basis of the
20 evidence concerning traffic generation on the record herein
21 that the [Public Works] Department's proposed improvements
22 to Hughey Lane are not required to serve the proposed
23 subdivision."³ Record 18. It is undisputed that Hughey
24 Lane does not presently meet the standards contained in the
25 LDO and is potentially hazardous. Record 30, 122, 125, 127.
26 It is also undisputed that the proposed subdivision will
27 generate additional traffic on Hughey Lane, since one must
28 travel along Hughey Lane when going from or to the

³The Public Works Department estimated that each residence generates approximately 10 trips per day. Record 219. The greater density allowed by the challenged decision would therefore generate an additional 30 trips per day.

1 subdivision. As there is no question that the residents of
2 the proposed development are required to use Hughey Lane and
3 so will be "served" by the requested improvements, we
4 understand the decision to say the fact that Hughey Lane is
5 already substandard and overburdened is not a factor in
6 deciding whether or not to permit development at greater
7 densities than two acres.

8 LUO 3.010(4)(k)(5) is intended to limit the cumulative
9 impacts on roadways addressed in Policy 3.17. In the
10 abstract, the term "providing access" can be interpreted
11 narrowly or broadly. However, to limit the application of
12 LUO 3.010(4)(k)(5) to Marvin Road and the cul-de-sac makes
13 meaningful consideration of cumulative impacts on county
14 roads impossible, and ignores the present condition of
15 Hughey Road, which will be used by all vehicles traveling
16 more than one-quarter mile from the subdivision.⁴

17 With respect to LUO 3.010(4)(k)(5), this assignment of
18 error is sustained.

19 **LUO 3.010(4)(k)(6)**

20 The challenged decision interprets "area," as the term

⁴On remand, the county may consider requiring petitioner to make improvements to Hughey Road as a condition to approval of the proposed subdivision. However, the county is not required to impose conditions to enable intervenors to create a subdivision at a density greater than normally allowed by the LUO. Shelter Resources, Inc. v. City of Cannon Beach, 27 Or LUBA 229, 241-42, aff'd 129 Or App 433 (1994). If the expense of upgrading Hughey Road to the standards contained in the LDO and its distance from the proposed subdivision make it impracticable or impossible, for constitutional or other reasons, to require the improvements as conditions to approval, the county may deny the application.

1 is used in LUO 3.010(4)(k)(6), to mean "the properties
2 surrounding Gilliam Court and Marvin Road, and adjoining or
3 within one-quarter mile of Hughey Lane, within one-half mile
4 of its intersection with Marvin Road." The limits of the
5 area are justified in part by natural boundaries to the
6 south and east. The decision interprets "residential
7 development" as "properties actually developed for
8 residential use." Although petitioner may be correct that
9 the delineation of "area" has been contrived to justify
10 approval of the proposed subdivision, both of these
11 interpretations are within the county's discretion under
12 Zippel, supra. See Friends of the Metolius v. Jefferson
13 County, 28 Or LUBA 591, 596 (1995).

14 The residential development within the defined area is
15 as dense as or more dense than the proposed development.
16 The county's conclusion that the proposed lot sizes are
17 compatible with the character of residential development in
18 the area is reasonable. Furthermore, the county's
19 interpretation of LUO 3.010(4)(k)(6) is not inconsistent
20 with the express language, purpose or underlying policy of
21 Policy 3.17, which addresses specific impacts. The county's
22 interpretation therefore satisfies ORS 197.829(1)(a) through
23 (c) (1995 edition).

24 With respect to LUO 3.010(4)(k)(6), this assignment of
25 error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner contends the findings and conclusions in the
3 challenged decision are not supported by substantial
4 evidence in the whole record. Petitioner's arguments under
5 this assignment of error are insufficiently developed to
6 warrant review. Neuman v. City of Albany, 28 Or LUBA 337
7 (1994); Deschutes Development v. Deschutes Cty., 5 Or LUBA
8 218 (1982).

9 This assignment of error is denied.

10 The county's decision is remanded.